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ABSTRACT

This monograph focuses on legal problems that schools might encounter in dealing with cases of child abuse. It opens with an article that introduces issues considered in more depth in the chapters that follow. Each of the articles focuses on a particular legal concern that may arise when a school district encounters a case of child abuse. The chapters, written by experts in the field, examine schools' responsibility under federal law, the careful selection of employees, child-abuse training, school employees' legal obligation to report suspected child abuse, issues in interagency cooperation, investigating and screening sexual misconduct charges, due-process issues, teacher sexual misconduct, confidential settlement agreements, legal issues for schools assisting abuse victims, school insurance policies, how schools should deal with child abuse, a prosecutor's view of how to work together for the sake of children, a social-work perspective on child abuse, and proposals for legislative and policy change. Because much of the law applicable to child abuse is controlled by state codes, administrative regulations, or decisions by state courts, the analysis presented in each chapter is general rather than specific in nature and should not be construed as legal advice. Eight appendices provide various sample policies and legal references. (RJM)

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CHILD ABUSE: LEGAL ISSUES FOR SCHOOLS

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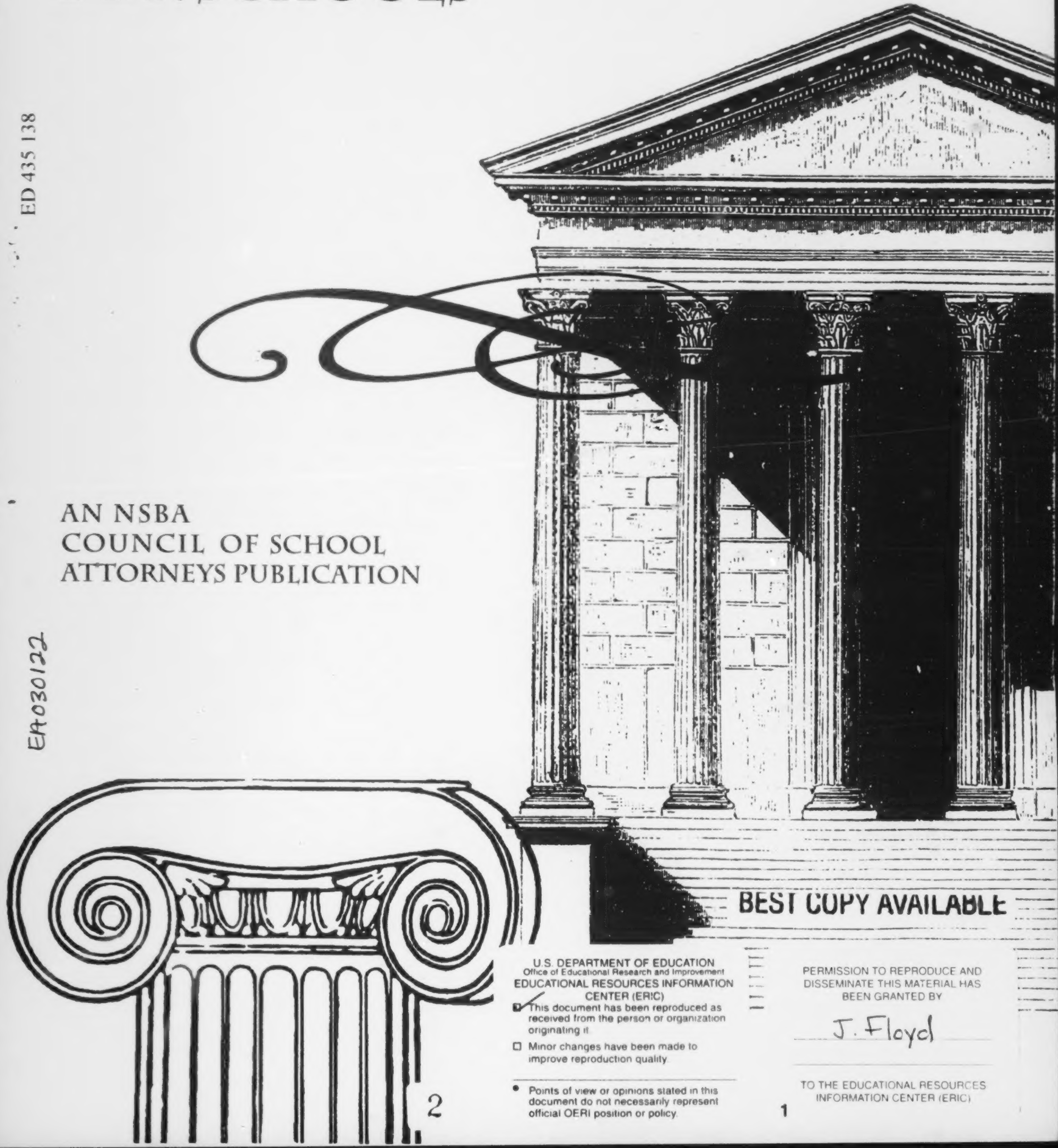

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CHILD ABUSE:
LEGAL ISSUES FOR SCHOOLS

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March 1994

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FOREWORD

Child abuse is one of the most horrible and tragic truths about our society. It is also one of its most complex problems with no easy solutions. But because of the unique position occupied by schools, it is incumbent upon them to do their utmost to prevent child abuse through educational programs and through effective response to suspected instances of maltreatment. Certainly, schools must endeavor to eradicate abuse within their own walls. Obviously, effective response to and prevention of child abuse involves myriad social, legal and medical issues that are primarily the province of other public and private entities. This monograph does not attempt to address all these issues but rather focuses on the legal problems that schools might encounter in dealing with cases of child abuse.

Some of the issues discussed apply both to cases of intrafamily abuse and neglect and to instances of school-based maltreatment, *e.g.*, reporting requirements and interagency cooperation; while others are pertinent only to problems associated with abuse by a school employee, *e.g.*, pre-employment checks, thorough investigation and due process requirements. Likewise, some of the information presented can be generalized to all forms of abuse—physical, sexual, mental, emotional or neglect—but other information is specific to only one form. Issues relating to sexual abuse of students by school employees is given extra emphasis because of the devastating impact it has on victims and the falsely accused and the potential liability it imposes on school districts.

The monograph opens with an article reprinted from the *American School Board Journal* which succinctly raises many of the issues considered in more depth in the chapters that follow. Each article focuses on a particular legal issue that may arise when a school district encounters a case of child abuse. Because much of the law applicable to child abuse is controlled by state codes, administrative regulations or decisions by state courts, the analysis presented is general rather than specific in nature. While the information presented strives to be accurate, it should not be construed as legal advice. If a particular issue regarding child abuse arises, readers are advised to consult a competent professional. The monograph also contains several articles written from the perspective of other parties who might be involved in a child abuse case in order to offer suggestions on how schools might better handle abuse cases. The final article looks at possible legal and policy reforms that the author believes would improve the response of schools to specific cases and to the broader social problem of child abuse. An appendix provides various sample policies and legal references.

I wish to thank the authors for contributing their time and expertise to this monograph and to the various legal, education and governmental organizations that assisted in its development. Finally, I extend my thanks to all the NSBA staff members who prepared these articles for publication.

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SHATTERED LIVES*
WHY SCHOOLS MUST FACE UP TO THE HARSH REALITIES OF CHILD SEXUAL ABUSE

Mary Nowesnick**

At age 14, Jennifer learned about sex from 40-year-old Daniel Campbell. A year later, when she was pregnant, Campbell posed as her father to consent to an abortion. Today, convicted of rape and lewd conduct with a minor under age 16, Campbell is in prison, not too far from where the two first met: in a classroom in Boise, Idaho — as teacher and student.

Stories like Jennifer's seem to be playing out with alarming regularity from coast to coast. According to the Chicago-based National Committee to Prevent Child Abuse (NCPCA), an estimated 2.9 million incidents of all types of child abuse and neglect were reported to child protective services agencies nationwide in 1992, up from 2.7 million reports in 1991 and 1.9 million reports in 1985. Not all those reports were substantiated by any means; in fact, fewer than half resulted in a finding, following an investigation by child protective services, that credible evidence existed to support the allegation that child abuse had occurred. Even so — and keeping in mind that the criteria used to substantiate reports of abuse differ by state — the NCPCA estimates that nationwide, nearly 1.2 million children were genuine victims of abuse in 1992.

And one of the most shocking forms of abuse these children can suffer is sexual abuse. The "sexual abuse or exploitation" of children under the age of 18 is one of several categories of child abuse and neglect defined by the landmark Child Abuse Prevention and Treatment Act, signed into law in 1974. Further amended in 1988, that law defines child sexual abuse as: "(A) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or (B) the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children."

Of the 2.9 million abuse cases reported in 1992, a little more than 17 percent — some 500,000 cases — represented reported child sexual abuse cases. If the ratio of substantiated-to-reported cases found at large also applies to sex abuse cases, it would mean that roughly a quarter of a million children actually were sexually abused last year. Educators were by no means the sole (or even the leading) perpetrators in these cases. In fact, because the state definitions of "perpetrator" vary, only 70 percent of states count maltreatment by school personnel as a reportable case of abuse, according to the NCPCA. In many cases, educator-related incidents are considered child assault and are investigated by the school district or the police, instead of by child protective services.

ABUSE IN THE CLASSROOM

What seems to be an increasing number of educator-related incidents are being reported as child sexual abuse, though. At any given time, a search of the Associated Press news wire will turn up numerous cases of educators charged or indicted with the sexual abuse of

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**Mary Nowesnick is a Chicago-based free-lance writer.

students. The following incidents are typical of the many that have made the headlines in the past year:

- A social studies teacher/coach at Northeast High School in Annapolis, Md., was convicted Sept. 8 on three counts of child sexual abuse, three counts of perverted sexual practices, and one count of fourth-degree sexual offense. The teacher, Ronald W. Price, had admitted to engaging in sexual acts with three female students but had maintained he was "not criminally responsible," according to area prosecutors. Since he was charged, additional indictments for child sexual abuse have been filed against two other teachers at Northeast, and the school is now undergoing a state investigation.

- An elementary school teacher in Bridgeport, Conn., currently faces two charges — first-degree sexual assault and risk of injury to a child — for assaulting a 12-year-old male student in a classroom at Beardsley School. The teacher, Joseph C. Edwards, has entered a not-guilty plea and is awaiting a trial date. Additionally, according to court records, Edwards was convicted of prostitution in July 1986, while he was a teacher in New Haven, Conn.; he was fined $40.

- A Boise, Idaho, principal was awaiting trial at press time on two counts of child sexual abuse and eight counts of battery. Timothy Neil, the principal at McKinley Elementary School since 1989, is alleged to have sexually abused and inappropriately touched female students between the ages of 9 and 12. He pleaded not guilty.

How many such incidents occur in U.S. schools is difficult to say. One of the few national studies to zero in on classroom culprits was last conducted in 1986 by the American Association for Protecting Children, a division of the American Humane Association in Denver, Colo. That study reported that school personnel were involved in less than 1 percent of reported child sexual abuse cases nationwide. Extrapolating from the 1992 rate cited by NCPCA, that would amount to somewhere around 5,000 reported cases nationwide — or 2,500 substantiated cases — of child sex abuse involving educators.

More precise data on educator perpetrators are not available, because studies of the matter have been halted by funding shortages. Despite the lack of hard numbers, NCPCA spokeswoman Joy Byers says, "There's no reason for the public to be alarmed that a great deal of child sexual abuse is committed by educators." Children face "more risk of abuse at home or with someone they know well than with educators," she adds.

Still, if measured only by daily news wire reports of alleged educator abusers, the problem is very real. As Laura Crumpler, legal counsel for the North Carolina School Boards Association in Raleigh, sees it, "There are people in this world who are pedophiles, and they target jobs like teaching that involve children. A lot of times, you just don't know [who you're dealing with] until they do something." When that happens, says Ruth Harms, a child-abuse prevention supervisor in the Washington state education department, school districts need to be ready with "a clear and thoughtful procedure for dealing with allegations." (See the box on page 3.)

Troubling as the educator-turned-abuser issue is, another concern is perhaps more pressing: What can — and should — schools do to help child victims of sexual abuse?

A recent check of educators and child abuse prevention specialists turns up a variety of answers: In many school districts, educators are attending training sessions and viewing videos to learn how to identify sexual and other forms of abuse. School districts are developing and circulating policies and procedures to ensure compliance with state reporting laws. And many educators are taking steps to show students how to avoid becoming victims of abuse.

A MORAL AND LEGAL RESPONSIBILITY

"I don't see how it's possible for us to ignore this problem," says Timothy Dyer, executive director of the National Association of Secondary School Principals in Reston, Va. "It's important to deal with — kids don't leave their hunger, abuse, or neglect at home."

text continues p. 4

WHAT TO DO WHEN THE ABUSER IS A SCHOOL EMPLOYEE

When asked by talk-show host Phil Donahue to comment on the problem of child sexual abuse by school employees, Sherry B. Bithell, a veteran teacher, had this rueful response: "We should not be so trusting of our educators. I am an educator, and it's very difficult to read the stories about these people who are in our schools. They drag us all down."

Statistics suggest the number of educators who abuse students is low (see main story), but even one case of this ultimate betrayal of trust is one too many.

And because allegations appear to be on the rise, you and your fellow school officials have to be ready always to protect potential victims of child abuse — and, sometimes, to protect yourself and your school district from legal action. For too long, says Bithell, author of the recently published *Educator Sexual Abuse: A Guide for Prevention in the Schools*, "it's not been until [educators] really get burned that they take notice of the problem."

Recognizing the problem is the first — and perhaps the toughest — step. Bithell explains that schools, like families, appear to have the same reactions when sexual abuse is discovered: denial, cover-up, defensiveness. In addition to the disbelief that a colleague could turn culprit or the fear that "what looks like abuse might not be," some school officials are reluctant to expose their schools to bad publicity, says Joy Byers of the National Committee to Prevent Child Abuse, Chicago.

But, warns the National Center on Child Abuse and Neglect (NCCAN), such a reaction — though perhaps understandable — doesn't hold up against the legal requirements. "It is important to remember that schools are mandated reporters whether the abuser is an outsider or a school employee," says NCCAN in its publication *The Role of Educators in the Prevention and Treatment of Child Abuse and Neglect*. If a teacher or other school employee in your district is accused of child sexual abuse, how should you respond? The following advice is culled from organizations and individuals working in the field of sexual abuse prevention:

- **Take all allegations seriously**. Gather as much information as possible as quickly as you can on any charges, even those that seem trivial at the outset.
- **Designate an unbiased person to gather information**. Whether it's the principal or another school official, the key is finding a person who can "remain neutral" and gather information that will "shed light on the situation," says Ruth Harms, a child abuse prevention supervisor with the Washington state education department.
- **Make sure key school personnel are informed**. The superintendent, the school attorney, and the personnel officer must know of the incident, no matter how minor the allegation might seem.
- **Develop district procedures for handling sexual abuse allegations**. This process must consider the rights of the staff members, the students, and the parents, say Harms and Bithell. More specifically, in *The Role of Educators*, NCCAN warns that "great care must be taken to ensure the confidentiality of information, to share it only with those persons designated by law." The publication goes on to advise notifying school administrators of any sexual abuse allegations involving staff members but warns that "the situation should not be discussed among the other staff. The accused has a reputation and the right to know of the accusation."

In addition, says Harms, your schools should have a community response plan that addresses the needs of the other students and parents, the school board, the press, and the faculty.

Prevention is, of course, the best course of action. Notes Bithell: "School districts need to transfer notice of sexual abuse offenses to the state credential file and contact previous employers" to check references and, where required, criminal records to discover any prior offenses by potential employees.*

Similarly, says a North Carolina attorney, you should never "pass the trash." A school district should never allow a suspected employee to resign in exchange for a "neutral, dates only" job reference — a practice that is all too common, this attorney notes. — M.N.

* *See* Jo Anna Natale, "Kooks, Crooks, And Kids," *The American School Board Journal,* January 1993.

In fact, most observers believe that educators — whether by instinct, ethics, or proximity — are well-suited to be key players in the fight against child sexual abuse. Here's how the National Center on Child Abuse and Neglect summed up the matter in its 1992 manual, *The Role of Educators in the Prevention and Treatment of Child Abuse and Neglect:* "In addition to a professional and moral responsibility, school personnel have a unique opportunity to advocate for children in a way that no other adults except parents can. If the parent is the abuser, this need for advocacy on the part of the school becomes even more imperative."

Clearer still is the legal mandate for educator involvement: In all 50 states, U.S. territories, and the District of Columbia, school personnel — typically defined as principals, teachers, nurses, and counselors — are deemed "mandated reporters." These personnel are required by law to report suspected child abuse, a designation that includes physical and emotional abuse, neglect, and sexual molestation.

Though state laws vary, suspicion of child abuse, according to the NCPCA, "generally means that the reporter has 'reasonable cause to believe' or 'reasonable cause to know or suspect' that the child has been maltreated. Reporters do not have to know that abuse actually took place in order to report." Additionally, every state law provides these so-called mandated reporters with immunity from civil and criminal liability for erroneous reports — provided the reports are made "in good faith." Says the NCPCA: "Good faith simply means an honest belief by the reporter that the child was abused or that the substance of the report, which may be only a suspicion, is valid."

To reinforce the reporting rule, state laws stipulate penalties — ranging from fines to jail time — for mandated reporters who fail to act. The NCPCA warns that more states are stepping up enforcement of those penalties. Already, says Howard Davidson, director of the American Bar Association's Center for Children and the Law in Washington, D.C., school officials who failed to report suspicions of sexual abuse, when those suspicions later were confirmed, have faced both civil liability and the loss of certification.

Even so, the American Association for Protecting Children says, only 16.3 percent of the abuse and neglect reports filed nationwide in 1986 originated from school personnel. That percentage has since dropped. In 1990, the organization says, U.S. educators turned in just 16 percent of the reports made nationwide. Given the motivations, mandates, and penalties society has provided, why aren't more educators doing their part to identify and report child sexual abuse?

For at least one teacher, the reason educators should do so is fundamental: "For whatever reason you hesitate for even one moment not to report [suspected child abuse], you are in the wrong profession, because you don't care about kids," says the unidentified teacher, who appears in "A Teacher Saved My Life," an instructional video prepared by the Illinois State Board of Education and other state groups.

EDUCATING EDUCATORS ON CHILD ABUSE

The charge of indifference is difficult to measure — or accept. It ignores the many real barriers that prevent well-intentioned educators from tackling the problem. Ironically, what's often missing for educators should be obvious: education. A National Teacher Survey, last conducted by the NCPCA in 1989, polled nearly 600 elementary or middle school teachers from 40 schools nationwide. Here are some of the findings:

- Only 49 percent of teachers reported that their schools provided workshops on topics germane to child abuse and neglect.

- Of those teachers who had been offered such workshops, 62 percent reported that the training was mandatory for all teachers, but was "typically offered only once a year or on an as-needed basis."

- Only half of all surveyed teachers reported that their schools circulated any written material on child abuse and neglect.

Against this backdrop, not surprisingly, the majority of these teachers (66 percent) believed the child-abuse education provided to them by their school district "was not sufficient" to enable them to identify cases of child abuse.

In her recently published book, *Educator Sexual Abuse: A Guide for Prevention in the Schools,* Sherry B. Bithell weighs in with a description of her own struggle to learn about child sexual abuse: "Incredibly, throughout my twenty-six years in public education, I always had to go outside the educational field to receive child abuse prevention training. The only regret I have is that it took so long for me to get the training, and that other educators do not have the same opportunities to participate in the projects I did."

Closely paired with insufficient education is inadequate guidance and support for the reporting of suspected child abuse. Often missing are school board policies that outline the district's overall strategy for sexual abuse training, reporting, and prevention. Also missing in many school districts are written procedures for implementing whatever policies do exist. According to the 1989 National Teacher Survey, only 57 percent of teachers indicated their school district had a clearly defined procedure for the identification and reporting of suspected child abuse cases. Worse: Fully 24 percent said they had no idea if their school board even had such a policy.

Anecdotal evidence from educators suggests school boards still are slow to put policies in place. Frederick Smith, principal of the Bradford Area High School, Bradford, Pa., has been a strong policy advocate following an incident of sexual misconduct by a former band director. That incident resulted in the landmark case of *Stoneking v. Bradford Area School District* in 1988, which held that school district officials could be held liable under the U.S. Constitution for employees who abuse children. Years later,

KEEPING TABS ON ABUSERS

Children should be able to learn in a safe environment that is maintained by professionals whose moral character is above reproach. Unfortunately, that is not always the case. And sometimes, a teacher who has admitted to misconduct or child abuse in one state is employed elsewhere by unsuspecting school officials.

To help identify these individuals, the National Association of State Directors of Teacher Education and Certification (NASDTEC) has established the Educator Identification Clearinghouse. The clearinghouse is owned and administered by NASDTEC and serviced by ACADEM, a private corporation in Cardiff-by-the-Sea, Calif. The project is supported by the Council of Chief State School Officers, the Education Commission of the States, the National Association of State Boards of Education, and the National Conference of State Legislatures.

All 50 states, plus the District of Columbia and the Department of Defense, participate in the Educator Identification Clearinghouse, which is protected by $1 million in liability insurance.

Here's how it works: On a regular basis, each participating jurisdiction provides ACADEM with a listing of the names, dates of birth, and Social Security numbers of those individuals whose applications for teacher certification have been denied or whose teaching certificates have been revoked, annulled, or suspended because of questionable moral character. Every month, ACADEM sends participating jurisdictions a listing of these individuals, by jurisdiction. Each year, ACADEM also sends a complete, updated list to all participating jurisdictions, either in print or on computer diskette.

Armed with these listings, it's up to the participating jurisdictions to check prospective teachers and, if necessary, take action. That is, the state agency runs its own list of certified/licensed teachers against the list provided by the Educator Identification Clearinghouse. If a name matches, the state agency checks with the state that has listed that individual to determine whether the nature of the teacher's actions warrants denial of certification.

The exact nature of the proceedings each state agency follows in such cases will vary from state to state. But the intent is the same: that no jurisdiction will facilitate or continue the certification of school professionals who potentially might put a child at risk.

Local school systems can check prospective teachers against the clearinghouse list by contacting their state education departments.— *Charles C. Mackey Jr., NASDTEC president and administrator, teacher certification policy, in the Office of Teaching, New York State Education Department, Albany.*

Smith says he continues to be contacted by school officials who are just now taking action. Recalling the "stress and strain" of his own legal and administrative headaches, Smith is emphatic: "Without a clear-cut policy, you're dead."

Other concerns can also hamper reporting, say the National Teacher Survey respondents:

- Fear of legal ramifications for false allegations (cited by 63 percent of respondents).
- Concerns about the consequences of child abuse reports, such as reprisal against the child and damage to parent-teacher and teacher-child relationships (52 percent).
- Fear of parental denial and disapproval (45 percent).
- Reluctance to interfere in parent-child relationships and family privacy (35 percent).
- Lack of community or school support regarding making abuse allegations (24 percent).
- School board or principal disapproval (14 percent).

Today, however, the credibility of children is one of the most difficult issues surrounding the vigorous implementation of protective actions in potential cases of child sex abuse. Here's how the April 19, 1993, *Newsweek* cover story, "Rush to Judgment," summed the current concerns: "Americans are at fever pitch over child sex abuse these days: We haven't done very well at preventing it, but we're frantic to root it out and stomp it to death no matter where it lurks — or doesn't." Adds the news weekly: "Sometimes, amid all the noise, real sex abusers are identified and convicted. But too often, critics charge, the evidence is flimsy and the pursuit maniacal."

But abuse prevention advocates counter that the current backlash is no reason to back down. "Although there are complicating factors [in sexual abuse cases], my tendency is to think that if a child is disclosing [an incident] to a teacher, it's difficult for that child to do," says Cheryl Peterson from the Department of Children and Family Services in Springfield, Ill. "You have to take it seriously." It's essential, she adds, that schools have "well-trained people who can discern if the child is truthful."

NCPCA's Byers sees the current credibility controversy as merely the predictable swing of the pendulum that occurs with any issue. Overall, "media coverage is good," she says. "It provides an opportunity to educate people on this issue." Byers isn't bothered by current media coverage, she says, unless it causes people "not to listen and pay attention to children."

TAKING HEED

Paying attention, however, means more than nodding in sympathy. To ensure that child victims are given prompt and appropriate help and that educators have the support, guidance, and protection that will enable them to respond effectively, school districts must develop a comprehensive plan of action. Drawn from an array of professional resources and rooted in practical experience, this overview suggests key elements in the school's response to child sexual abuse — by educators or anyone else:

- **Know the law**. Personnel in your schools should be aware of the federal Child Abuse Prevention and Treatment Act, which defines sexual and other forms of abuse. They also should know your own state's statute, which defines who, what, when, where, and how to report suspected cases of abuse. Some states, such as New York, require that all school districts provide policies, procedures, and training regarding mandatory reporting. The National Center on Child Abuse and Neglect also provides federal guidelines that outline "standards of good practice" for such areas as reporting procedures and prevention programs.

  Legal know-how is best obtained from your own school attorneys, and that's especially important advice right now. Child sexual abuse cases are triggering "increasing numbers of legal claims, both at the federal and state level, against a variety of school officials, who can face potential civil and criminal — in the case of educator perpetrators — liabilities, including money damages," warns attorney Gail Sorenson, an education professor at the University of North Carolina, Charlotte. Howard Davidson of the American Bar Association agrees that legal complexities and emerging trends in case law mean "school boards and their attorneys must keep up with the legal literature."

- **Develop and disseminate policies and procedures**. The NCPCA sums what numerous experts and educators advise: "Every school district should have a school board policy on child abuse." Such a policy should, for instance, express the board's concern for abused children and their families; require the reporting of suspected child abuse; mandate in-service training for all staff members on how to recognize and report abuse; and encourage cooperation with the local Child Protective Services agency. Among other available resources, the National Center on Child Abuse and Neglect provides a sample model policy in its manual entitled *The Role of Educators*.

  Also key, says the NCPCA, are procedures "to handle reports of suspected child abuse and to implement board policy." Among its suggestions, which may be found in full in the NCPCA's publication *Educators, Schools, and Child Abuse*, are these: stating how and to whom reports of suspected child abuse should be made; appointing a school liaison with the local child protective services; specifying when and by whom in-service training will be conducted; and spelling out the civil, criminal, and administrative penalties for failure to report.

- **Be prepared with a swift and sure response if a school employee is charged with child sexual abuse**. Know your employees' rights — and your responsibilities as an employer. Experts advise following a clear-cut suspension policy that specifies whether a suspected employee is to be placed on leave with or without pay. Once such a charge is made, the school board and teacher union should be notified; consult your school attorneys for next steps.

  In her book, Bithell suggests that all news coverage of the case should be handled "only by the district designee." Finally, she warns, no individual has "the right to go public by taking the question of abuse to other educators . . . or students." Doing so, she says, is a "certain guarantee to victimize a student and ruin an educator's reputation before there is clear evidence."

- **Train school personnel**. Joan Duffell of the Seattle-based Committee for Children stresses that good training "empowers" educators with the necessary skills to identify and report child sexual abuse. As such, Duffell and others suggest that training should define sexual abuse, its causes and impact, and outline the signs and symptoms of abuse. Additional training topics include: what, how, when, where, and to whom to report suspicions of abuse; what happens after the report is made; and what role educators should play in follow-up support and prevention. Child abuse prevention agencies nationwide provide extensive resources, including manuals and videos. Local police departments and social service agencies also can be excellent resources for training support.

- **Educate children**. To ensure that training is effective for children — and approved by adults — curriculum content and design must be "age appropriate," says the NCPCA's Byers. "You don't have to be explicit, but children need to know what's 'good touching,' and what isn't." A widely used program is the Committee for Children's "Talking About Touching." Tailored to different grade levels, it aims to teach children the "new 3 R's": how to recognize, resist, and report abuse. To ensure appropriate training, says Duffell, the information "must be scripted out as much as possible. This is no place for adlibbing." Taking these steps, experts contend, is the best way for you to overcome doubts and fears about the school's role in preventing child abuse. More important, a ready response makes your schools what Howard Davidson of the American Bar Association says abused children must be able to count on: safe havens.

WHERE TO GET MORE HELP

In addition to local professionals, such as child welfare agencies and police departments, you can turn to the following national organizations and publications for information on child abuse:

American Bar Association, Center on Children and the Law, 1800 M St. N.W., No. 200-South, Washington, D.C. 20036; (202) 331-2250.

C. Henry Kempe National Center for the Prevention and Treatment of Child Abuse and Neglect, 1205 Oneida St., Denver, Colo. 80220; (303) 321-3963.

Clearinghouse on Child Abuse and Neglect Information, National Center on Child Abuse and Neglect, P.O. Box 1182, Washington, D.C. 20013; (800) 394-3366.

Committee for Children, 172 20th Ave., Seattle, Wash. 981122; (800) 634-4449.

National Committee to Prevent Child Abuse, 332 S. Michigan Ave., Suite 1600, Chicago, Ill. 60604-4357; (312) 663-3520.

National Resource Center on Child Abuse and Neglect, 63 Inverness Drive East, Englewood, Colo. 80112-5117; (800) 227-5242.

National Resource Center on Child Sexual Abuse, 107 Lincoln St., Huntsville, Ala. 35801; (800) KIDS-006.

Educator Sexual Abuse: A Guide for Prevention in the Schools, by Sherry B. Bithell, 1992; available from Tudor House Publishing Company, Boise, Idaho; (800) 666-4767, ext. 400.

The Forbidden Apple: Sex in the Schools, by former Aurora, Colo., Superintendent Victor Ross and educator John Marlowe, 1985; available from ETC Publications, P.O. Box ETC, Palm Springs, Calif. 92263-1308; (619)325-5352. — M.N.

CHILD ABUSE IN THE SCHOOLS: RESPONSIBILITY UNDER FEDERAL LAW

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Federal lawsuits brought by parents against school districts and school administrators for the alleged abuse of their children have typically been brought under section 1983, alleging a constitutional violation. Courts seem to be analyzing cases in one of two ways — first, holding that the "special relationship" between schools and students, resulting from either compulsory attendance laws or the nature of the role of teachers, creates a duty to protect; and second, that the school district's "deliberate indifference" to the plight of an abused student creates a policy, practice or custom of unconstitutional conduct. Since the U.S. Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992), upheld the right of a student to sue for damages for intentional sex discrimination under title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, suits are also being brought under title IX alleging sexual harassment. Of course, state tort actions may also be alleged, but this article is limited to federal causes of action.

SEXUAL ABUSE AND THE U.S CONSTITUTION: SUITS UNDER SECTION 1983

Abuse by Employees — The Stoneking Standards

- **Is There a Constitutional Right?**

The first Supreme Court decision in a school child abuse case, *Ingraham v. Wright*, 430 U.S. 651 (1977), held that the Eighth Amendment's proscription against "cruel and unusual punishment" does not apply to disciplinary corporal punishment in the public schools, even where it is "exceptionally harsh." "The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner." 430 U.S. at 670. The Court ruled that although corporal punishment implicates a constitutionally protected liberty interest, traditional common-law remedies afford adequate procedural due process. The Court noted, however, that it was not deciding the question of whether severe corporal punishment of a child implicates substantive due process. Nevertheless, *Ingraham* has been cited by a number of courts, *see, e.g.*, *Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980), in support of the principle that a student may sue for damages under section 1983, claiming a violation of his or her substantive due process right to be free from bodily injury.

Another Supreme Court decision cited by plaintiffs in school abuse cases, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), held that a county social service agency's failure to protect a child from beatings by his father, even given substantial evidence that social service personnel were aware that the father was abusing the child, did not implicate due process. The due process clause is intended to protect individuals from the State, not to ensure that the State protects them from others. The Court rejected the contention that there was a "special relationship" between the agency and the child giving rise to an affirmative duty to protect. However, the Court noted that under rules established in its "custody" cases, it might have reached a different result had the agency taken the affirmative step of placing the child in a foster home. For example, the Court held in *Estelle v. Gamble*, 429 U.S 1066 (1976), that because of the "special relationship" between prisoners and the State, the State's "deliberate indifference" to the medical needs of a prisoner would violate the Eighth

Amendment. That standard has been expanded to cases involving involuntarily committed mental patients. *Youngberg v. Romeo*, 457 U.S. 307 (1982). And lower courts have found the State liable for failing to protect children placed in foster homes. *See, e.g., Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987). Arguably, the openness of the public schools, as described by the Court in *Ingraham*, places them in a different category than mental institutions. Nevertheless, lower courts, citing compulsory attendance laws, have equated students with prisoners and mental patients and found a constitutional duty to protect. *See, e.g., Doe v. Taylor I.S.D.*, 975 F.2d 137 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1066 (1993), *reh. granted*, 987 F.3d 231 (1993).*

On the same day that the Court rendered its decision in *DeShaney*, it vacated and remanded, in light of *DeShaney*, a decision involving schools. In that case, *Stoneking v. Bradford Area School District (Stoneking I)*, 869 F.2d 591 (3rd Cir. 1988), *vacated and remanded*, 109 S.Ct. 1634 (1989), the lower court held that female students in a Pennsylvania public school had a constitutional right to be free from sexual abuse by a school band director and that the "special relationship" between the students and the school district gave rise to a duty to investigate the allegations and to take steps to protect the students. On remand, the court mused that it could continue to rest its decision on a duty to protect arising out of the "special relationship" created by the state's compulsory education laws which, in effect, place children in the "custody" of the schools. However, because of the "uncertainty of the law in this respect," the court instead ruled that the officials acted with "deliberate indifference" to the constitutional rights of the students by their custom that communicates condonation of the behavior. *Stoneking v. Bradford Area School District (Stoneking II)*, 882 F.2d 720 (2d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). *Stoneking II* is perplexing because it applies a standard of "deliberate indifference" without addressing the issue of whether there is a "special relationship" between schools and students. The Supreme Court has applied the "deliberate indifference" standard only where there is a custody relationship — a "special relationship" — between the parties. *Stoneking II*, in effect, finds a constitutional wrong without determining the constitutional right.

Courts frequently omit the crucial first step in section 1983 analysis, *i.e.*, finding a constitutional right, and have instead proceeded directly to the section 1983 rules for attributing unconstitutional acts of government employees to their employers. The High Court recently took the opportunity to try to set lower courts straight on this issue through its decision in *Collins v. Harker Heights*, 112 S.Ct. 1061 (1992). The Court held that the city was not liable under section 1983 for the death of a city sanitation sewer worker who was asphyxiated in a sewer where his supervisor sent him to work. The court of appeals found for the city on the ground that *Monell v. Department of Social Services*, 436 U.S. 658 (1978), applies only where the Government abuses its power against a citizen, rather than when it acts as an employer. A unanimous Supreme Court affirmed the judgment but ruled that the employment relationship "is not of controlling significance." The High Court traced its cases under section 1983 to show that in each of the cases the Court had "assumed" the occurrence of constitutional wrongdoing before reaching the issue of attribution of the wrongdoing to the governmental unit. Because the government cannot be held liable under the doctrine of *respondeat superior* in a case brought under section 1983, courts must analyze whether the injury was caused by governmental policy. In *Harker Heights*, the plaintiff failed to meet the threshold criterion of constitutional wrongdoing, so the Court had no need to reach the second question of determining responsibility for the wrongdoing. The Court held that there is no substantive due process right to a safe working environment and the city's conduct in failing to warn of danger or to train supervising employees was not "arbitrary, or conscience-shocking, in a constitutional sense." 112 S.Ct at 1070.

The Court undoubtedly expected *Harker Heights* to curb the careless analysis by lower courts which have applied section 1983 liability attribution principles such as "deliberate indifference" and "failure to train" to hold governmental entities liable under section 1983 for conduct which constitutes nothing more than a tort. But it appears that lower courts are now misinterpreting *Harker Heights*. For example, the decision in *Doe v. Taylor*,* *supra*, cites *Harker Heights* for the proposition that "deliberate indifference in training employees provides the necessary causal link to hold a municipality liable for the torts of its employees." 975 F.2d at 145.

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* See endnote 1.

If the Supreme Court at some point ultimately holds that students are in the "functional" custody of their schools, thus giving rise to a right to be protected in the schools, courts will then have to look to section 1983 to determine whether the employee's actions can be attributed to the school district. In *City of Canton v. Harris*, 489 U.S. 381 (1989), the Court held that inadequacy of police training may serve as a basis for section 1983 liability where such deficiency amounts to "deliberate indifference" to the rights of persons with whom police come into contact and where the identified deficiency in the training is closely related to the ultimate injury. Thus, if there is a "duty to protect," school districts may be held liable under the "deliberate indifference" test for tortious actions of employees where it is shown that a school district inadequately trained its administrators to recognize signs that employees or other students are engaging in abusive conduct and to follow up on complaints.

- ***Stoneking I* Standard — Duty to Protect Based on a Special Relationship**

In *Doe v. Taylor I.S.D.* *, *supra*, a panel of the Fifth Circuit Court of Appeals held that school districts had an affirmative duty to protect a 14 year old girl who was sexually abused by a teacher/coach. After the Supreme Court denied *certiorari*, the Fifth Circuit on its own motion, withdrew the decision and set the case over for reargument *en banc*. Oral argument was held in May, 1993 and as of February, 1994 the court had not yet rendered its decision. Although the decision has been withdrawn, it is still being cited by plaintiffs, so it is beneficial to discuss the case. Several female students had expressed to the principal their suspicions about the coach, but the principal responded that the coach "just had a way of flirting with the girls." When asked by the principal about rumors regarding a relationship between them, both the student and the coach denied its existence. Ultimately, the coach pled guilty to criminal charges. The panel ruled for the plaintiff, citing *Rochin v. California*, 342 U.S. 165 (1952), for the proposition that the substantive due process component of the Constitution "forbids a state actor from arbitrarily yet intentionally inflicting physical injury upon a person" using means that "shock the conscience." 975 F.2d at 141. The panel decision in *Doe v. Taylor* distinguished between mere negligence, which is not actionable, and intentional torts and cited a number of Fifth Circuit cases holding that corporal punishment raises a liberty interest protected by substantive due process.

The finding that schools owe an affirmative duty to protect was grounded first, on the proposition that school officials are responsible for supervision of subordinates and second, on a duty to protect students from "known or reasonably foreseeable harms" and, therefore, the superintendent and the principal are liable under the supervisory liability standards established in *Jane Doe A, infra*. The school officials' duty to protect students from harm derives from the "special relationship" arising from compulsory attendance laws under which schools have "functional custody" of the students. "To hold otherwise would call into question the constitutionality of compulsory attendance statutes." 975 F.2d at 147. Under this theory school officials can be held liable for their "deliberate indifference" to the rights of the child by failing to properly investigate the allegations. Finally, the court held that sexual harassment is proscribed by the equal protection clause.

In *Black v. Indiana Area School Dist.*, 985 F.2d 707 (3rd Cir. 1993), the Third Circuit was again asked to hold a school district liable under a special relationship theory for the sexual abuse of a student. In this case, a male school bus driver, employed by a private contractor, sexually molested two female students. The superintendent investigated both incidents immediately upon receiving each complaint, but the matter was not brought to the attention of the youth services department until receipt of a second complaint. Citing *DeShaney*, the court granted summary judgment in favor of the school district and the superintendent, stating that the schools cannot be held liable for private actions of third parties unless the state restrains the liberty of the individual. In this case neither compulsory attendance rules or any other state rule required the children to ride the bus. In addition, the superintendent acted promptly to investigate and, even if he should have reported the first incident to the child protection agency, his conduct did not amount to "deliberate indifference" under *Stoneking II*.

Two companion cases decided in 1993 distinguished *Black* and *D.R. v. Middle Bucks Area Vocational Technical School*, *infra*, (involving student against student harassment), holding that teachers owe a higher duty to students than do other employees. *C.M. v. Southeast Delco School Dist.*, 828 F. Supp. 1179 (E.D. Pa. 1993); *K.L. v. Southeast Delco School Dist.*, 828 F. Supp. 1192 (E.D. Pa. 1993). The district judge held that *teachers* have an affirmative duty to protect the students in their charge. He refused to go as far as the Fifth Circuit panel in *Doe v. Taylor* to equate students with prisoners and base the affirmative duty on a "custody" relationship. Instead, it is the special relationship of teacher and student that gives rise to the duty, a responsibility which would not be applied to janitors or cafeteria workers. "The holding is limited to teachers, whom the state has placed in sensitive positions involving close, daily contact with children, and over whom school administrators have direct supervisory authority." *K.L. v. Southeast Delco School Dist.*, 828 F. Supp. at 1196. The court also held that plaintiffs may raise an independent cause of action alleging a practice, custom or policy of deliberate indifference, the standard in *Stoneking II*. The employee in the cases was a male special education teacher who allegedly sexually, physically and verbally abused the male plaintiffs and engaged in sadistic behaviors. Teachers allegedly complained on numerous occasions to administrators, but nothing was done. The employee was later convicted of sexually abusing a number of children.

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* See endnote 1.

- ***Stoneking II* Standard — Custom or Policy of Deliberate Indifference**

Plaintiffs pled the *Stoneking II* standard of "deliberate indifference" in *Thelma D. v. Board of Educ.*, 934 F.2d 929 (8th Cir. 1991). Plaintiffs argued that the board had a custom of failing to receive and investigate complaints of sexual misconduct of employees, resulting in the sexual abuse of six students by a teacher. The court held that five complaints against the teacher over a 16 year period were not sufficient, given the fact that the school system has over 4000 employees, to comprise "a consistent and widespread pattern of unconstitutional misconduct" and, because only the board has final decision making authority, knowledge of lower level employees could not be imputed to the board. The court implied, however, that the board might not be able to insulate itself from liability in the future by reserving all policy making to itself.

> The magnitude of the tragedy underlying this litigation compels us to sound a final cautionary note to the Board and other similarly situated public agencies. In the future, this court will closely scrutinize bureaucratic hierarchies which, in their operation, tend to insulate its policymaking officials from knowledge of events which may subject them to section 1983 liability. This case, in conjunction with *Jane Doe "A"*, should provide clear warning to the Board that in the future a defense of no liability due to lack of knowledge may no longer apply to a bureaucracy which continues to block notice to the Board of allegations of sexual abuse of students committed by teachers and others during school related activities.

In *Jane Doe A v. Special School Dist.*, 901 F.2d 642 (8th Cir. 1990), the Eighth Circuit Court of Appeals apparently assumed the existence of a constitutional right to bodily integrity but did not expressly reach that issue. It held that the sexual abuse of eleven handicapped children by a school bus driver did not result from "deliberate indifference" by either school district officials or the school board. The court ruled that individual school officials may be held liable only if they: (1) had notice of a pattern of unconstitutional conduct; (2) demonstrated "deliberate indifference" or "tacit authorization" of the conduct; (3) failed to take "sufficient" remedial steps; and (4) such failure resulted in the damage to the children.

A number of district courts have refused to follow *Stoneking I* and the Fifth Circuit panel decision in *Doe v. Taylor**, with regard to the underlying constitutional issue — whether compulsory attendance laws give rise to a constitutional duty to protect — but have followed *Stoneking II* and *Jane Doe "A"* in order to hold that school districts can be held liable for employee child abuse cases where the school district has a custom, practice or policy which caused the deprivation. *See, e.g., Doe v. Board of Educ. of Hononegah School Dist. 207*, 833 F. Supp. 1366 (S.D. Ill. 1993); *Doe v. Douglas County School Dist. RE-1*, 770 F. Supp. 591 (D. Colo. 1991). Although ruling that there was no "special relationship" giving rise to an affirmative duty to protect students from child abuse, two decisions gave plaintiffs the right to amend their complaint to plead another theory under section 1983. *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267 (7th Cir. 1990); *Doe v. Petaluma City School Dist.*, 830 F. Supp. 1560 (S.D. Cal.1993). The court in *J.O.* cited *Stoneking II* for the proposition that school administrators may be liable for policies that "allow child sexual abuse to flourish."

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* See endnote 1.

In *Floyd v. Waiters*, 831 F. Supp. 867 (M.D. Ga. 1993), the court refused to find that a security guard's kidnapping and assault of a 14 year old girl resulted from the board's custom or policy. The supervisors of the security force were not policy-makers for whose actions the school district could be held liable, despite evidence that the supervisors had received complaints about the employee. The assault took place after another security guard asked the offending guard to take the girl home after she had been placed in custody for making a disturbance at school. Under school district policy, security officials are required to use security department vehicles to transport students and not to transport students without written request of the principal. The court found that there was an established custom of not following these polices, but the district's failure to train was not sufficient to establish liability in absence of a link between the failure and the injury. This case is an "isolated incident." Where the custom causing the injury is far removed from the injury, plaintiffs must show an "extremely high degree of municipal culpability."

In a Fifth Circuit decision rendered prior to its decision in *Doe v. Taylor**, the court assumed *arguendo* the existence of a constitutional right and that the bus driver who inflicted the injuries on the student was acting under "color of law," but held that the school district could not be held liable for the principal's inadequate investigation of reports on the bus driver's conduct because the district did not "officially sanction or order the error in judgment." *Spann v. Tyler I.S.D.*, 876 F.2d 437 (5th Cir. 1989).

Similarly, in another Fifth Circuit decision rendered after the court withdrew the panel's decision in *Doe v. Taylor**, the defendants conceded for the purpose of trial that the students have a constitutional right to be protected from sexual abuse by school employees, yet the court overturned the jury verdict in favor of plaintiffs in the amount of $500,000 on the ground that the facts did not support a finding of "deliberate indifference." *Gonzalez v. Ysleta Independent School Dist.*, 996 F.2d 745 (5th Cir. 1993). The evidence showed that the district had a child abuse policy requiring the principal to make an oral report without delay and a written report within five days. Prior to this case, all employees who had been accused of sexual misconduct with students during the time in question had been permanently terminated. In this case, the teacher was accused of assaulting an elementary school girl by putting his arm around her waist and sticking his tongue in her ear. The principal investigated, and the teacher admitted putting his arm around her but denied sticking his tongue in her ear. No action was taken by the principal, and the parents appealed to the board which conducted a hearing. The board appointed the deputy superintendent to investigate. He reported that it was the "little girl's" word against the employee's and punishment should be limited to a written reprimand requiring him to seek counseling. The board did not terminate the accused teacher because it did not have sufficient evidence; instead, the teacher was transferred to another school. Later the teacher was accused of molesting another child at the school to which he was transferred. The board held a hearing and suspended the teacher without pay pending criminal prosecution. He was later terminated after his conviction. The court found that while the district may have been negligent in transferring the teacher rather than terminating him after the incidents at the first school, its actions did not rise to the level of deliberate indifference to the welfare of students.

In a similar case, *Gates v. Unified School Dist. No. 449*, 996 F.2d 1035 (10th Cir. 1993), the Tenth Circuit refused to find "deliberate indifference" where the board had been aware that a teacher had "encouraged" a student who was infatuated with him but was unaware of any sexual involvement with the student. The teacher married the girl shortly after her graduation and then became sexually involved with another student. School officials heard rumors about the relationship but were unable to prove it. The court distinguished the facts from those in *Stoneking*, where school officials "received, repressed and concealed at least five complaints." *Id.* at 1042.

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* See endnote 1.

- **"Color of Law"**

In some cases, plaintiffs have attempted to hold school districts liable for the abusive acts of their employees committed outside the jurisdiction of the school, arguing that the negligence of the school district in hiring the employee and then introducing him to the students caused the injury. In *D.T. v. Independent School District*, 894 F.2d 1176 (10th Cir. 1990), the plaintiffs charged that an elementary school teacher/coach sexually molested several students at his home during the summer after a non-school district sponsored sports event. Unbeknownst to the school district, the coach had been convicted of sodomy in Texas. Plaintiffs argued that the school district was negligent in not discovering this fact before hiring the coach. The appeals court overturned a jury instruction which stated that the coach was acting "under color of law." The court distinguished *Stoneking* on the ground that the acts in that case were committed on school premises, whereas here, the school district had no control over the coach's actions. The court also rejected the lower court's instruction on "deliberate indifference," holding that, as a matter of law, there was insufficient evidence that the school district's policy of "investigating, hiring and supervising teachers was so wanting that it constituted deliberate indifference or reckless disregard for the constitutional rights of the plaintiffs." 894 F.2d at 1194. The court apparently believed that sexual molestation is a "constitutional tort" and a section 1983 claim will lie for deprivations involving such molestations, but the court did not have to reach that issue because of its decision on the section 1983 standard. 894 F.2d at 1187.

In *K.L. v. Southeast Delco School Dist.*, *supra*, the court held that the plaintiff could not recover damages for the period of time after the plaintiff's graduation at which time a sexual relationship between the boy and his special education teacher began, because that out-of-school relationship did not involve "state action."

Student against Student Abuse Cases

A number of cases address the issue of school district liability for abusive behavior committed by students against students. In *Lopez v. Houston I.S.D.*, 817 F.2d 351 (5th Cir. 1987), a student sustained serious injuries in an attack by other students on a school bus. The court did not discuss the underlying constitutional right involved but held that although there was no evidence that the school district's training program was sufficiently lacking to rise to the level of "deliberate indifference," the school bus driver's failure to protect the plaintiff could support a jury finding of "callous indifference and was the cause of injury." The court also found the driver's action to "abuse state power," the concept on which the Fifth Circuit rested its decision in *Harker Heights*. As discussed above, the Supreme Court affirmed *Harker Heights* but for different reasons than those propounded by the Fifth Circuit.

In *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3rd Cir. 1992) (*en banc*), a hearing impaired female student alleged that she was repeatedly physically and verbally assaulted and sodomized by male students in a unisex bathroom and photography dark room in an arts class. There was also evidence that the student teacher could not control the class and was herself harassed. The student complained to an administrator of the school, but no action was taken. A majority of the court ruled there was no "special relationship" giving rise to a substantive constitutional right to be protected, because parents can decide where the child's education can take place. Thus, there is no "functional custody" which would equate the classroom with a prison or mental institution. The court also refused to follow *Stoneking II* because the acts in this case were committed by private actors. A strong dissent opined that compulsory attendance laws do place students in the "functional custody" of the schools, given the fact that the choice of sending their children to private school is no choice at all for most parents.

Pagano v. Massapequa Public Schools, 714 F. Supp. 641 (E.D.N.Y. 1989), held that an elementary school student states a claim against his school district under section 1983 when he alleges that on 17 separate occasions he was the target of verbal and physical abuse by other students. The student alleged that school officials were aware of the attacks and did nothing to prevent them from occurring in the future. Citing *Doe v. New York City*, 649 F.2d 134 (2d Cir. 1981), the court held that the relationship between school and student is more analogous to a custody relationship than was that in *DeShaney* and that the defendant's failure to take preventive steps rose to the level of "deliberate indifference."

In *Dorothy J. v. Little Rock School Dist.*, 7 F.3d 734 (8th Cir. 1993), the court held that no custodial relationship existed between a student and a high school community-based instruction program sufficient to impose an affirmative constitutional duty to protect him from the attacks of another student. The allegation that the school knew of the violent propensities of the student did not affect the court's opinion; nor did the fact that the plaintiff student was mentally retarded. Similarly, in *Russell v. Fannin County School Dist.*, 784 F. Supp. 1576 (N.D. Ga. 1992), the court held that the State's compulsory school attendance law does not create a "special relationship" which imposes a constitutional duty on a school to protect students from assaults inflicted by other students on school grounds. The court rejected the argument that regular occurrence of fights at school was sufficient to alert school officials that the student was in danger; the court also refused to find that the school's disciplinary policies on fighting at school in any way caused the injuries sustained by the student.

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Until the High Court's decision in *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992), plaintiffs typically did not cite title IX in child abuse cases. The Court in that case ruled that a student may sue a school district under title IX of the Education Amendments of 1972 for damages resulting from sexual harassment by a district employee. Title IX prohibits discrimination on the basis of sex in federally assisted education programs and activities, 20 U.S.C. §§ 1681-1688. Although a number of lower court decisions had ruled in title IX sexual harassment cases involving students at the higher education level, this was the first reported title IX case charging sexual harassment committed against elementary and secondary school students. The discussions on child abuse and assault cases brought under section 1983 are also instructive in determining liability under title IX, because in the absence of additional guidance from the Supreme Court, lower courts may apply similar tests in title IX cases alleging sexual molestation by school employees. The "right" to be free from sexual harassment in a federally assisted school is established by statute. The primary issue in cases involving alleged sexual misconduct by school employees is under what circumstances can the actions of the harasser be attributed to the school district. It should be noted that title IX applies only to *gender*-based harassment, thus same sex harassment would generally not come under its purview.

Franklin v. Gwinnett County Public Schools

The U.S. Supreme Court held in *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992), that a student may sue a school district for monetary damages for intentional discrimination in a case brought under title IX of the Education Amendments of 1972. Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681.

The student in this case claimed that a coach had sexually harassed her both verbally and physically even to the extent of coercive sexual intercourse. She filed a complaint with the Office for Civil Rights (OCR) of the U.S. Department of Education. After an investigation, OCR found that the school district had violated title IX.

OCR found violations of several title IX regulatory provisions:

§ 106.8 *Grievance procedure*. A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints . . . .

§ 106.31 *Education programs.*

(a) *General*. [N]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient . . . .

(b) *Specific prohibitions.*

* * *

(2) Recipients shall not provide different aid, benefits, or services or provide

aid, benefits, or services in a different manner on the basis of sex.

* * *

(4) Recipients shall not subject any person to separate or different rules of behavior, sanctions, or other treatment on the basis of sex.

* * *

(7) Recipients shall not otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity on the basis of sex.

Finally, section 106.71 of the regulations provides that title VI procedures shall be followed under title IX. (34 CFR 100.6 *et seq.* contains the title VI procedures.)

Because the coach had resigned and the district had adopted a grievance procedure, OCR determined that the district had brought itself into compliance. The student brought a lawsuit seeking damages.

Both lower courts ruled that a private damages remedy is not available under title IX. The Supreme Court reversed, holding that Congress's action in passing the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7(a)(1), (abrogating Eleventh Amendment immunity under title IX and other civil rights statutes) and the Civil Rights Restoration Act of 1987, P.L. 100-259, 102 Stat. 403, (expanding the coverage of title IX to all activities operated by a recipient of federal funds) validated the High Court's ruling in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and evidenced congressional intent that the "traditional presumption . . . [that] courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute" should be applied to title IX. 112 S. Ct. at 1035. In *Cannon* the female plaintiffs sought admission to medical schools at two private universities. The Supreme Court upheld their right to pursue a cause of action under title IX for alleged violations of their statutory rights. The Court rejected the Government's contention that the rule in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), limiting remedies for unintentional violations of statutes passed under the Spending Clause, should be broadened to limit remedies for intentional conduct.

With its decision in *Gwinnett*, the Supreme Court resolved any question raised in some lower court decisions as to whether a private right of action for damages lies under title IX. The Court cited *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), for the proposition that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, the supervisor discriminate[s] on the basis of sex." Presumably, the Court would apply title VII standards to cases brought under title IX, although it remains unclear as to how far the Court will go in holding school districts responsible for sexual harassment on campus. For example, EEOC has ruled that title VII prohibits sexual harassment of employees by nonsupervisory fellow employees. Would the same rule apply to harassment by fellow students?

The Court in *Gwinnett* did not have to decide whether the alleged harassment was *quid pro quo* or hostile environment harassment, thus leaving room for school districts to argue that title IX applies only in cases of *quid pro quo* harassment. That was the issue in *Patricia H. v. Berkeley Unified School Dist.*, 830 F. Supp. 1288 (N.D. Cal. 1993). The court held that a plaintiff does state a claim under title IX by an allegation of hostile environment harassment. The court, citing a submission of the Office for Civil Rights, ruled that in determining the existence of hostile environment harassment, courts should apply a "reasonable student" standard. *Id.* at 1296. OCR's recommendation is that the determining body should consider "the age of the victim(s); the frequency, duration, repetition, location, severity, and scope of the acts of harassment [and] the nature and context of the incidents . . . ." Request for Judicial Notice, Ex. N at 2.

The Title VII Metaphor

In *Meritor* the Supreme Court accepted the EEOC's Guidelines holding that title VII bars sexual harassment that conditions job benefits on submission to the harassment (*quid pro quo*) or that creates a "hostile working environment," regardless of economic loss. The Court ruled that the plaintiff must show that the advances were "unwelcome," but the claim is not foreclosed by the plaintiff's voluntary submission to advances, and the harassment must be "sufficiently severe and pervasive." The Court refused to issue a "definitive rule" as to employer liability but agreed with the Equal Employment Opportunity Commission that employers can be held responsible for the sexual harassment of their employees. Citing Congress' definition of "employer" in title VII, which includes "agent," the Court noted that "Congress wanted courts to look to agency principles for guidance in this area . . . [E]mployers may not be automatically liable for sexual harassment by their supervisors . . . [but] absence of notice to an employer does not necessarily insulate that employer from liability." 477 U.S. at 72.

EEOC's guidelines on sexual harassment defines "sexual harassment":

> (a) Harassment on the basis of sex is a violation of [title VII]. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment [*quid pro quo*], (2) submission to or rejection of such conduct by an individual is used as the basis for employment decision affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11; *see also* EEOC Policy Guidance on Current Issues of Sexual Harassment, Policy Number N-915-050 (March 19, 1990).

- **Quid Pro Quo Harassment**

Where a teacher uses his or her position to threaten a student with reprisals, such as the lowering of a grade or removal from a sports team or extracurricular activity or where a student's receipt of a benefit or right to participate in an activity is conditioned on submission to sexual advances, undoubtedly courts will hold the school district liable for the conduct even if the offensive act is committed off school premises. At least one court has imposed absolute liability for *quid pro quo* harassment of employees. *See, e.g., Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599 (7th Cir. 1985). The EEOC has also taken the position that employers are absolutely liable for *quid pro quo* discrimination. In its policy guidance the agency points out that the Supreme Court's decision in *Meritor* "noted with apparent approval the position taken by the Commission in its brief that:"

> Where a supervisor exercises the authority actually delegated to him by his employer by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them.

EEOC's policy also cites *Schroeder v. Schock*, 42 FEP Cases 1112 (D. Kan. 1986), for the proposition that an employer will always be responsible for *quid pro quo* discrimination. In that case, the court held an employer liable for *quid pro quo* harassment even though the sexual advances were made at a restaurant after work. The court held that because the supervisor was acting within the scope of his authority when he made or recommended employment decisions, his actions are imputable to the employer.

Courts will not necessarily apply the same standard in student cases. Damages for lost wages and other economic losses are convenient remedies to impose on an employer where a supervisor is guilty of *quid pro quo* discrimination. However, damages in a student case are more likely to be for pain and suffering and other non-economic losses; courts may be reluctant to award such relief on the basis of strict liability where there is no evidence of actual or constructive notice to the district. Whether or not the court ultimately agrees that damages are automatically awardable to a student in either a *quid pro quo* or hostile environment case, if the school fails to take immediate action to correct the situation — implementation of a training program, notice to students of their title IX rights, workable grievance procedure, etc. — the school is certainly opening itself up to the *potential* for a lawsuit and the award of damages.

- **Hostile Environment**

EEOC's policy statement recognizes that it may be difficult to determine "the distinction between invited, uninvited but-welcome, offensive-but tolerated, and flatly rejected" sexual advances. That statement should not be applicable, however, to school district employee advances toward students. Undoubtedly, plaintiffs will argue that an underage child does not have the legal or emotional capacity to "welcome" or "consent" to sexual advances by school employees. Courts are likely to consider such behavior as *per se* "unwelcome," the factual question for the courts being whether the conduct constitutes a "sexual advance" or is merely "friendly" or "protective," rather than whether it is "welcome." In its policy statement discussion of "welcomeness," EEOC suggests that victims "assert their right to a workplace free from sexual harassment" in order to stop the harassment at the outset. This advice may not be appropriate for students because of their youth and inexperience and the imbalance of power between the child and the teacher or other school employee. Nevertheless, students should be encouraged to report conduct which makes them feel "uncomfortable," because early warnings to the school administration may keep such conduct from escalating.

Some of the section 1983 cases cited above indicate that there may have been insufficient investigation of allegations. Even if the principal in *Doe v. Taylor*, for example, had been correct that the teacher was "merely flirting" with the students, the teacher should have been directed to cease such conduct. "Flirting" between teachers and students is inappropriate.

- **Non-physical Harassment**

The EEOC guidelines discuss the question of when verbal remarks become harassment. Considerations include "the nature, frequency, context, and intended target of the remarks." Some courts have developed a "reasonable prudent woman" standard as a substitute for "reasonable prudent person." Under this standard courts look at the effect of the remarks on the woman, rather than accepting the man's defense, for example, that he was just "kidding around." The conduct must be "serious and pervasive" in order to constitute harassment although verbal conduct can constitute harassment without any accompanying physical conduct. However, an isolated instance is probably not sufficient.

Application of Agency Principles

In *Meritor* the Court accepted the EEOC's position that agency principles should apply in determining responsibility for sexual harassment in employment. As discussed above, the EEOC believes that employers will always be liable for *quid pro quo* harassment because of the supervisor's actual authority to make employment decisions or in the case of students, decisions on grades, participation in extracurricular activities etc. However, agency principles are not as easy to apply to hostile environment cases.

In its policy guidance, the EEOC cites its brief in *Meritor* to assist in defining the scope of an employer's liability for "hostile environment" harassment. EEOC's brief argued that an employer is liable "if there is no reasonably available avenue by which victims of sexual harassment can make their complaints known to appropriate officials who are in a position to do something about those complaints." The EEOC points out that the Court neither accepted nor rejected this position, and thus, the Commission concluded that it would look to the "agency capacity" of the harassing employee and consider whether an "appropriate and effective" complaint procedure existed and whether the complainant used it.

The question arises as to whether agency principles should be applied in a student case brought under title IX. At least one court has ruled that agency principles do *not* apply in such a situation. In *Floyd v. Waiters*, 831 F. Supp. 867 (M.D. Ga. 1993), a middle school student sued the Bibb County Board of Education and a number of district officials under both title IX and section 1983, claiming that in 1989, at the age of 14, she was falsely imprisoned and assaulted by a school district security guard, William Booker. A week later her twin sister was kidnapped and raped by Booker. The assaults took placed in a house operated by Booker's supervisor, Waiters, as a "club" used at Waiters' invitation by security guards for card games, drinking and illicit sex.

The court refused to adopt the Supreme Court's standard in *Meritor*, that common-law agency principles determine whether an employer is liable for acts of sexual harassment committed by its employees. The court compared the title VII definition of "employer" which includes "any agent of such a person," with title IX which defines "program or activity" to mean "operations of . . . a school system." The court further found that even under agency principles, the school district would not be liable for the acts of the employee because they fell outside the scope of his employment and were "purely personal acts for which the Board is not vicariously liable." The court said *Gwinnett* is distinguishable because in that case the school district knew of the conduct of the teacher and, therefore, the teacher's actions "could constitute discrimination under a 'program or activity.'" 831 F.Supp. at 876.

- **Direct or Imputed Authority**

The EEOC describes "direct" authority (also known as "actual" authority) in terms of whether the employer "knew or should have known" of the harassment. It is unclear whether that standard would also apply under title IX. One federal court in California ruled in a case involving student-against-student harassment, that the "knew or should have known" standard should not be applied in a title IX case because the statute only applies to *intentional* conduct. *Doe v. Petaluma City School Dist.*, *supra*.

"Imputed" authority exists when the employee is acting in an "agency capacity." The EEOC cites Restatement (Agency) § 219(2)(d) for the proposition that "an employer also may be liable if the supervisor 'was aided in accomplishing the tort by the existence of the agency relationship.'" This application of the doctrine of "apparent authority" seems a bit far fetched, but undoubtedly, plaintiffs will use it to buttress their claims under title IX as well as title VII. *D.T. v. Independent School District* held in a section 1983 case that an employee was not acting under "color of law" when he sexually abused several students during the summer at his home. The court refused to adopt the plaintiffs' position that the district should be held liable for the coach's actions because the students were introduced to the coach by the school district and their trust for him was a result of his employment in the school district. The concept of "color of law" is similar to the agency standard of "scope of authority," but it remains unclear whether courts will be willing to expand school district liability under title IX to scenarios such as that in *D.T.*.

- **Estoppel**

The EEOC policy also discusses "estoppel" as a theory of liability. Under this theory a principal is liable for "negligent or reckless" supervision, if the employer had actual or constructive knowledge of the sexual harassment and failed to take remedial action. In the student context, this theory is similar to that of "deliberate indifference" under section 1983.

- **Apparent Authority**

The EEOC's policy under title VII coincides with the early title IX rulings that the existence of a policy against sex discrimination and a grievance process is not controlling. However, the EEOC's policy opines that if, "in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management," the employer would be held liable under the doctrine of "apparent authority." This fiction of the perpetrator's "apparent authority" is not easily transferable to the context of an intentional tort. The doctrine of "apparent authority" holds the principal liable where the principal has placed the agent in a position which leads third parties to believe the agent is authorized to take the action in question and the third party acts in reliance on that "apparent authority." Surely, no reasonable person would believe that an employee's harassment was authorized by the employer, however negligent the employer may have been in its investigation of complaints. It would appear that the section 1983 standard of "deliberate indifference" would be easier to apply than the doctrine of "apparent authority."

- **Student Against Student Harassment**

The EEOC Guidelines provide that an employer is responsible for acts between fellow employees and acts in the workplace by third parties who are not employees if the employer (or supervisory employees) "knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." Arguably, the same rule would apply to harassment by other students. Title IX prohibits discrimination "under" any federally assisted education program or activity and would appear to be as broad as title VII. However, as noted above, one court refused to apply that standard under title IX. In *Doe v. Petaluma City School Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993), while agreeing that proof of hostile environment harassment will state a claim under title IX, the court dismissed the case because of the failure to show that the school district participated in the harassment of a student by her peers. The plaintiff must prove *intentional* discrimination, not merely that school officials "knew or should have known of the hostile environment and failed to take appropriate action to end it." *Id.* at 1563.

The "deliberate indifference" standard in section 1983 cases requires at least constructive knowledge by the school district. Similarly, if the school district has constructive notice of severe and repeated acts of sexual harassment by fellow students, that may form the basis of a title IX claim.

It is unlikely that the courts will hold a school district liable for sexual harassment by students against students in the absence of actual knowledge or notice to district employees. The language of title IX prohibiting "discrimination under" any federally assisted education program gives OCR jurisdiction to require the school to do something about discriminatory actions of students against students, but whether there is a private right of action in such cases is problematic. If the district does not have a grievance mechanism, its chances of losing a case of this kind are certainly greater, because the argument will undoubtedly be made that the district would have known of the harassment had it offered students a mechanism to complain about it.

POLICY DEVELOPMENT

It is arguable that courts have exceeded their authority in granting relief in child abuse cases under section 1983. Nevertheless, title IX remains a viable alternative for plaintiffs and every school district is, or should be, dedicated to the proposition of preventing child abuse regardless of their legal obligations to do so.

It is important to initiate comprehensive training programs for employees on the subject of abuse of students, including recognizing, reporting and refraining from abuse. The administrator or other appropriate school employee charged with receiving complaints of child abuse must also be thoroughly trained in specialized investigative techniques necessary to the proper handling of such cases and the appropriate bounds of their investigative responsibilities. The cases indicate that school officials have a tendency to err in favor of believing the employee. School officials often tend to brush off student complaints as exaggerations or even as deliberate attempts to libel a school employee. *All* complaints should be taken seriously and adequately investigated, and the employee should be placed on administrative leave pending completion of the investigation and resolution of the complaint. Students and parents should also receive each year clear and adequate notice of their rights and the availability of a mechanism for complaining. For more discussion of training issues, see Gittins, N. "Child Abuse Training: Reducing Occurrence and Liability," at page [ ].

END NOTES

1. *Author's Note:* As this article went to press, the Fifth Circuit issued its *en banc* decision in *Doe v. Taylor. Doe v. Taylor I.S.D.*, (No. 90-8431) (5th Cir. March 3, 1994). The court refused to hold that compulsory attendance laws create a "special relationship" giving rise to duty to protect students in the schools, but the court held that a school employee's physical sexual abuse of the student violated her constitutional right to substantive due process. The court held that plaintiff's allegations were sufficient, if proved, to justify a finding that the principal was "deliberately indifferent" to plaintiff's constitutional rights. The court granted summary judgment for the superintendent, ruling that his actions were "ineffective, but not deliberately indifferent." Two dissents were filed on behalf of six of the fourteen justices. A footnote in the opinion provides an interesting analysis of the dual duties of administrators to investigate allegations of child abuse while protecting the rights of accused employees:

   > It has been suggested that our opinion today might force a school official to subject himself to liability by acting on incomplete information. This misinterpretation should be corrected. Surely an official does not expose himself to liability by reporting the information to a superior; or by advising a subordinate state actor of rumors or information that the official has received and warning the actor that severe disciplinary actions will be taken if the rumors are confirmed, or if plausible information of misconduct continues to come to his attention to investigate such information; or if disputes arise as to the reliability of that information, to hold a hearing — closed door, if justified — to resolve such disputes. In short, there are many courses of action open to a school official that negate deliberate indifference but do not expose the official to liability on grounds of taking premature disciplinary action against a state actor.

PROTECTING CHILDREN BY CAREFUL SELECTION OF EMPLOYEES

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INTRODUCTION

To the extent possible, school districts must effectively screen out potential child abusers from the school system in order to protect students from the threat of child abuse by a school employee. Some positions within schools demand more careful scrutiny than others either because they require children to be alone with adults for substantial periods of time or they place a single adult as the only supervisor of children. Other positions that allow less contact with children may not warrant such an intense level of scrutiny. Nevertheless, because of the complexity of the school setting and the ever-increasing concern about the safety of children, the hiring of all school personnel demands a cautious approach.

In order to screen out any person who might pose a risk to children, a school district must follow much the same hiring process as that necessary when considering who is the best candidate for a position; i.e., thoroughly investigate the prospective employee's background, including qualifications, prior work experience, pertinent job-related characteristics, references, education, and other relevant information. How much investigation is required, who should be investigated, who should conduct the investigation, and what liabilities are created for the school district by the methods used to answer these questions must be considered.

Individual states, cities and schools districts have widely varying approaches to the investigation of applicants for different positions. For example, California requires fingerprinting of prospective teachers and others. The fingerprints are submitted to state and federal agencies for criminal records checks. Other states do not require fingerprinting or background checks of school personnel, leaving each school district to devise its own screening procedures. Several states provide school districts with no access to criminal records or child abuse registries and some prohibit employers from asking about criminal records or else limit the employers' use of such information. *See* Rothman, R., "*Background Checks,*" Education Week, April 2, 1986 at 1, 18.

The extent or intrusiveness of the investigation of prospective school employees can create a conflict between the protection of children from risk and the infringement of the civil rights of the applicants or employees investigated. Should a school district investigate every applicant or only the successful candidate? How far into the background of each individual is it reasonably necessary to pry? What information should be sought, from whom, by whom? How is this information to be obtained, verified, and retained? The questions are many, and about the only certainty is that, regardless of the answers and thoroughness of a given investigation, if a child is abused, it will be alleged that the school district failed in its efforts. But with a good screening process and carefully considered personnel practices in place, the ability both to hire the best candidates and to avoid risks to students is greatly enhanced.

LIABILITY FOR FAILURE TO INVESTIGATE OR FOR INADEQUATE EMPLOYEE INVESTIGATIONS

In the unfortunate situation where a school employee is found to have abused a student, the school district will likely be sued under a number of different legal theories, such as violation of the student's civil rights under

42 U.S.C. § 1983 or Title IX,[1] tort liability theories such as *respondeat superior*, negligent hiring, negligent retention, negligent supervision, negligent entrustment, or failure to warn, or violation of child abuse statutes.

Negligent Hiring

As this discussion focuses on the selection of employees, the question of liability related to failure to discover an applicant's prior misconduct is primarily considered. Such liability is often framed in the context of the tort of negligent hiring or negligent retention; the former alleges negligence occurred at the time of hire, and the latter alleges negligence after hiring. To assert a claim of negligent hiring, the plaintiff/abused student must allege that there was an employment or employment-like relationship between the abusing employee and the school district, that the employee causing the harm was incompetent or unfit for the position, that the school district knew or should have known of this unfitness or incompetence at the time of hire, and that the employee's unfitness or incompetence caused the injury.

- **Distinguished from *Respondeat Superior***

The tort of negligent hiring is not based on vicarious liability for an employee's actions or failure to act. This is the concept of *respondeat superior* where the employer is expected to respond, i.e., be liable for the actions of the employee in so far as the employee's actions or inactions were within the scope of his/her employment. Different jurisdictions may define "scope of employment" differently. A common version is as follows:

> The test for determining whether an employee is, at a given time, in the course of his employment, is whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment or by the specific direction of his employer, or, as sometime stated, whether he was engaged at the time in the furtherance of the employer's interests.

McGrail v. Department of Labor and Industries, 190 Wash. 272, 277, 67 P.2d 851 (1937).

In *DiCosala v. Kay*, 91 N.J. 159, 450 A.2d 508 (1982), the court explained the difference between the two theories of *respondeat superior* and negligent hiring as follows:

> The tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual. While the doctrine of *respondeat superior* is based on the theory that the employee is the agent or is acting for the employer. Therefore, the "scope of employment" limitation on liability which is a part of the *respondeat superior* doctrine is not implicit in the wrong of negligent hiring.
>
> Accordingly, the negligent hiring theory has been used to impose liability in cases where the employee commits an intentional tort, an action almost invariably outside the scope of employment, against the customer of a particular employer or other member of the public where an employer either knew or should have known that the employee was violent or aggressive or that the employee might engage in injurious conduct toward third persons.

450 A.2d at 515 (citations omitted).

From this distinction, it is apparent that the molestation or abuse of children would not be within the scope of employment of any school employee, and the district would not be liable, absent extraordinary circumstances, for the criminal actions of an employee under a *respondeat superior* theory.[2] If it were shown, however, that at the time the employee was hired, he had a past record of child molestation and that prior employment had provided the targets for his abuse, the failure to discover this record and to allow him access to future victims might be the basis for school district liability under the tort of negligent hiring.

- **Distinguished from Negligent Entrustment**

If a bus driver had a heart attack while driving the bus and children were injured, the doctrine of *respondeat superior* would not hold the employer liable, because having a heart attack is not within the scope of one's employment. However, if it were known at the time of hire that the employee had a serious heart condition making an attack and accident likely or foreseeable, the theories of negligent hiring, negligent retention, or negligent entrustment might be asserted to create liability. Negligent entrustment arises where an employer entrusts a dangerous instrumentality, such as a weapon or vehicle (the school bus), to an unfit or incompetent person. It requires no employment relationship and is described as:

> One who supplies directly or through a third person, a chattel for the use of another, whom the supplier knows or has reason to know to be likely, because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts, § 390 (1965). Negligent entrustment usually involves entrustment of vehicles, weapons, dangerous instrument or drugs and is less likely to be raised in the context of child abuse.

- **Liability for Independent Contractors and Volunteers**

The selection of independent contractors or volunteers who are placed in positions where they cause injury can create liability similar to that for negligent hiring. *See* "When is Employer Chargeable with Negligence in Hiring Careless, Reckless, or Incompetent Contractor," 78 A.L.R.3d 910. The concept of negligent hiring "predicated on the negligence of an employer in placing a person with known propensities in an employment position in which it should have been foreseen that the individual posed a threat to others," Schmitt, "Employer Owes a Duty to the General Public to Use Reasonable Care in Hiring and Retaining Employees," 9 BALT. L. REV. 435 (1980), could be extended beyond the hiring of permanent employees. Therefore, a school district could be liable for negligent hiring in the selection or use of volunteers or substitutes found to abuse children, just as if employees had committed such misconduct. Thus, the supervision and selection of volunteers and substitutes also merits attention.

Negligent Referral: Liability to Third Parties

Schools may also be sued for negligent referral. In *Bowman v. Parma Board of Education*, 542 N.E.2d 663 (Ohio App. 1988), one school district managed to remove from employment a teacher who had been accused of pedophilia. The teacher went to work in another school district and abused a student there. The court held that a secret settlement between the teacher and the first district violated public policy. The *Bowman* case raises the question of the liability of the former district to an innocent third party if information is kept hidden or, if during employee reference checks, the applicant's past record is misrepresented to the prospective employer. Under general tort law theories, it would seem probable that liability could result. Yet, in *Cohen v. Wales*, 518 N.Y.S.2d 633 (A.D. 2d Dept. 1987), a former employing school district was found to owe no duty to a child allegedly abused by a teacher who was recommended by the former district to the district where the abuse occurred, without disclosing that the teacher had been charged with sexual misconduct. The court said, "The mere recommendation of a person for potential employment is not a proper basis for asserting a claim of negligence where another party is responsible for the actual hiring". *Id.* at 634.

Despite this one ruling, hiding negative information or making secret agreements raises not only possible legal exposure but serious public policy issues as well.[3] But providing negative information about a former or current employee might generate litigation by that employee against the reference providers, claiming defamation, interference with contractual rights, discrimination or invasion of privacy. The possibility of such claims makes the prospective hiring district's job much harder because the negative information needed is probably that which the past employer is least willing to release for fear of being sued. Nevertheless, a prior employer's hesitance or refusal to share information should signal a potential problem and trigger a more in-depth investigation.

REASONABLE AND ADEQUATE INVESTIGATION

Key Elements

The decision about the level of investigation to be conducted depends on a number of factors, including state law requirements, legal restrictions on records access, the individual position being filled, the ability to complete the investigation timely and efficiently, and budgetary constraints. This discussion assumes that only those persons who are offered employment will be investigated. Detailed background review of applicants not being hired does not appear justified. Rather, thorough investigations which require time and resources should be expended on activities of the greatest importance and benefit.

School districts need to take those steps necessary to learn enough about the prospective applicant so that no unreasonable threat to others is posed. Consequently, the adequacy of the pre-employment investigation often is the focal point of any negligent hiring or similar case. The degree of diligence necessary in any such investigation depends upon the specific position to be filled and the level of risk which would occur from the performance of the employee in that position. Thus, it would be more important to conduct a thorough investigation of an elementary school teacher who spends time alone with small children than of a mechanic in the district's maintenance department who is rarely around school children. Regardless, some states have enacted legislation allowing or requiring that all school district employees be subjected to criminal record checks for certain identified criminal convictions. Failure to make such a criminal records check could be argued to be negligence per se. School districts in states with such laws should carefully review their application and hiring procedures to ensure compliance. *See* Davidson, "Protection of Children Through Criminal History Record Screening: Well Meaning Promises and Legal Pitfalls," 89 DICKINSON L. REV. 577 (1985).

The place to begin most investigations of prospective employees is with a good application form which requires complete information about experience, training, prior employment, past supervisors, reasons for leaving past employment, dates, places and addresses of all prior employment, convictions of crimes, and other pertinent information. Generally, only convictions of crimes related to the particular position may be considered to disqualify an applicant for the position. *Green v. Missouri Pacific R. R. Co.*, 10 FEP Cases 1409 (8th Cir. 1975). The school district should request from the applicant a signed waiver and release regarding any information provided by former employers to the prospective employer. (See Appendix ?).

The suggestion has been made that polygraph tests or other similar pre-employment examinations be given. However, because of the numerous statutory restrictions on their use together with the constitutional issues raised, these tests are rarely used or advisable. Many states expressly prohibit their use as a pre-hire measure and limit other exploratory techniques, such as psychological testing. *See* Hartsfield, *Investigating Employee Conduct*, Ch. 5 (Callaghan and Company, 1988).

At a minimum, the investigation and reference check should seek (1) to verify that all information provided by the applicant is accurate and complete; (2) to determine if the employee has the requisite skills, ability, and experience to succeed in the position being filled; (3) to identify any possible weaknesses or problems with the person's performance; (4) to fill in any blanks in employment history or experience; (5) to confirm any credentials required and their currency; and (6) to discover any known defects in the candidate's fitness for the position. This investigation should include criminal records checks where applicable and available, fingerprinting if required by law, and checking of references provided by the applicant and inquiring of past supervisors, personnel officers, or others not listed by the applicant. If any of the information obtained raises suspicions, a follow-up investigation should be pursued.

Other sources of information which should be considered, if available in the jurisdiction, might include child abuse registries; clearinghouses, such as the Educator Identification Clearinghouse of the National Association of State Directors of Teacher Education and Certification (NASDTEC);[4] state certification offices; past employment records; and other agency or court records for pertinent information, such as allegations of child abuse. To avoid unnecessary intrusiveness, the investigation should cover job-related matters and not aspects of the applicant's private life unrelated to the position.

It is important to keep in mind the limitations on inquiries that may be made of an applicant so that charges of employment discrimination are not raised. For example, under a variety of state and federal laws prohibiting employment discrimination, inquiries into areas of race, color, national origin, sex, age, marital status, religion, and disability are prohibited and may be found to be unlawful discrimination. The EEOC has also taken the position that if an employer's practice of refusing to hire employees based on conviction records has an adverse impact on a protected class, the school system must demonstrate that its employment decisions based on criminal records were justified as a business necessity by reviewing: (1) nature and gravity of the offense(s); (2) lapse of time since conviction and (3) nature of the job. EEOC Revised Policy Statement on the Issue of Conviction Records under Title VII (Feb. 27, 1987).

Until an investigation is completed, no offer of employment should be made. In this way, should adverse information about the prospective employee be revealed, the district will not be in the difficult position of withdrawing an offer that has already been extended. Employment needs and the time it takes to complete a background check do not always coincide well, but withdrawing an offer of employment which has already been accepted, can be awkward at best and, at worst, can bring legal challenges.

Representative Cases

- **Ponticas v. K.M.S. Investments: Check Employment References and Criminal Records**

One case that points out the need for thorough reference checks and background investigation is *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 38 A.L.R.4th 225 (Minn. 1983). K.M.S. Investments owned an apartment complex managed by Skyline Builders who hired Dennis Graffice as the resident apartment manager. Graffice used his position to enter the plaintiff's apartment where he sexually assaulted her. Skyline's hiring process had failed to detect that Graffice had criminal convictions in two states and a consistently poor work history. When Graffice applied for the apartment manager position, Skyline interviewed him and ran a credit check but failed to contact his listed references. Although not identified as such, these were his mother and sister, for whom he supplied no telephone numbers and only one address. Graffice admitted on the application that he had been convicted of "traffic tickets," but Skyline conducted no verification of his criminal history. Graffice testified later that had he been asked to sign an authorization to release his criminal record, he would have declined and not pursued the job any further.

The defendants argued that, even had they learned of his convictions, it would not have been foreseeable that he would commit sexual assault as he had not done so in the past. However, the court said of the defendant's background investigation:

> Appellants [defendants] had the duty to exercise the care that a reasonable landlord would have exercised under the same or similar circumstances. The scope of the duty was commensurate with the risks of the situation. Before a breach of this duty may be found by a jury, it must be established that the employee was in fact unfit, taking into consideration the nature of the employment and risk posed by the employee to those who foreseeably would come into association with him.
>
> * * * * *
>
> The scope of the investigation is directly related to the severity of risk third parties are subjected to by an incompetent employee. Although only slight care might suffice in the hiring of a yardman, a worker on a production line, or other types of employment where the employee would not constitute a high risk of injury to third persons, a very different series of steps are justified if an employee is to be sent, after hours, to work for protracted periods in the apartment of a young woman tenant. . . *Kendall v. Gore Properties,* 236 F.2d 673, 678 (D.D.C. 1956).

331 N.W.2d at 912-13.

• Welsh Manufacturing v. Pinkerton's Inc.: Check Character References for Sensitive Employment

Another non-school case gives further insight into the level and type of investigation necessary. A Rhode Island case, *Welsh Mfg. v. Pinkerton's Inc.,* 474 A.2d 436, 44 A.L.R.4th 603 (R.I. 1984), discusses the reasonableness of an investigation by a business for a security guard position. The guard hired stole from the business and passed on information about the business to others to aid them in stealing. The guard, a 21-year-old part-time employee, had filled out a general employment application which requested names of former employers and three persons who had known him for more than five years. The business did not contact the character references, but did contact the employee's high school principal and prior employer who did not comment on the subject's honesty or trustworthiness. The court discussed the adequacy of the investigation:

> The sensitive nature of the employment coupled with the opportunity and temptations incident to it, would lead to the conclusion that a prudent employer in these circumstances should rely on more than the absence of specific evidence or statements that a potential employee is dishonest or criminally inclined. We believe that a reasonable investigation would call for affirmative statements attesting to an applicant's honesty, trustworthiness, and reliability and perhaps also require the disclosure of the basis upon which the recommending person has relied. Realizing that job applicants generally provide references who are certain to produce favorable reports, we think that background checks in these circumstances should seek relevant information that might not otherwise be uncovered. When an employee is being hired for a sensitive occupation, mere lack of negative evidence may not be sufficient to discharge the obligation of reasonable care.

474 A.2d at 441.

• D.T. v. Independent School District: Check Out Rumors

The case of a school district in Oklahoma demonstrates the obstacles and legal problems associated with employee investigations. In *D.T. v. Independent School Dist.,* 894 F.2d 1176, 58 Educ. L. Rep. 483 (10th Cir. 1990), *cert. denied,* 111 S.Ct. 213, 112 L.Ed.2d 172 (1990), three male elementary students alleged civil rights violations and sought damages from a Pawnee County school district based on sexual acts committed against them by a male teacher, Stephen Lee Epps, during summer vacation at a basketball camp. The plaintiffs alleged that the school district violated their constitutional rights and acted in reckless disregard of these rights in the hiring, supervision, and investigation of Epps.

Epps was hired in 1981 to teach fifth grade and to coach boys basketball. The application screening process conducted by the superintendent did not reveal that ten years earlier Epps had been convicted of sodomy in Texas. While on probation for the crime, Epps taught in Lancaster, Texas. Because Texas law prohibits an individual with a criminal record from holding a teaching certificate, the Lancaster school district had not inquired about Epps' criminal history. The Pawnee County superintendent's application and selection process for Epps had followed the practice then in place in the State of Oklahoma. The application form did not inquire about criminal records because, as in Texas, under state law a person with a felony record could not obtain a teaching certificate. In addition, no computerized system existed in 198[illegible] o record and retrieve criminal history.[5] Epps' certificate and other information was received from Oklahoma State University, including recommendations from college professors and school administrators. The superintendent conducted telephone interviews with those listed as making recommendations.

Shortly before the start of the 1981 school year, the superintendent received a call from a cousin of Epps in Arizona who stated that Epps had visited her home that summer and had physically fondled her young son. The superintendent took this report seriously and proceeded to investigate Epps further. Epps denied the accusations. In addition to confronting Epps, the superintendent contacted others, including the principal in Lancaster, Texas, where Epps had taught. The principal said Epps had done a good job, had not been fired, and that he had never heard of any incident involving Epps and children during the five years he had taught there. The superintendent double-checked other sources of information but could not corroborate the rumor; nevertheless, he instructed the principal to watch Epps closely. The principal did so and saw no problem, and no further rumors surfaced.

At the district court trial, the jury awarded the three boys $135,000, and the school district appealed. On appeal the school district argued that because the molestations occurred during the summer at a basketball camp when the teacher was not under contract with the district, the requisite "state action" did not exist to sustain the civil rights action. The appeals court found no state action in the molestation of the boys and deemed the evidence of the school district's process of investigating, hiring and supervising teachers insufficient to show the necessary deliberate indifference or reckless disregard of the plaintiffs' civil rights. So the school district ultimately succeeded in its defense but only at the expense of concerted time, effort and money—costs the district incurred despite the superintendent's considerable efforts to trace rumors, reliance upon certification requirements, and lack of means to discover the past criminal record of any prospective teacher.

The case emphasizes the importance of following up rumors in order to verify or dismiss them.[6] The specific steps to be taken will depend on the nature of the rumors and allegations raised.

PRACTICAL SUGGESTIONS

School districts are greatly concerned about the health and safety of the children in their care as well as about the quality of the educational services they provide, and hence the selection of the best qualified staff who will protect rather than harm children is imperative. One tool to lessen the risk of child abuse at school and to hire the most able employees is a thorough, fair, and substantive hiring process which includes a background investigation. Steps to consider are as follows:

1. Review current personnel procedures or policies to learn what currently exists to help or to hinder needed screening practices, careful applicant investigations, and good hiring decisions. Amend, adopt or eliminate any policies or procedures as needed to implement sound personnel practices. Make sure that these policies and procedures meet state requirements on background checks.

2. Make thorough background checks of prospective employees an indispensable step in the selection process. Identify an appropriately trained individual to carry out these investigations. This is not an area in which those untrained in personnel practices should operate.

3. Identify which positions in the system will receive what level of review. Consider how much access a position has to children and recognize that applicants for such positions need most scrutiny. Plan to investigate the background of applicants the district intends to hire.

4. The investigation:
   a. Review the school district's employment application to ensure it requests the information needed.
   b. Obtain from applicants authorizations and releases or waivers for gathering information.
   c. Determine under state law whether criminal records can or must be checked and, if so, the scope of the check and the appropriate use of information received; e.g., what effect does the age, seriousness or final resolution of the criminal contact have on the selection process. Know state requirements about fingerprinting. If the district does undertake a criminal records check, provide notice to applicants that such information will be sought.
   d. Decide which records will be used, who will receive them, and where they will be stored.
   e. Identify the persons to be interviewed about the applicant, including past supervisors. References

should be asked about an applicant's eligibility for re-hire. Always seek information from individuals besides those references provided by the applicant.

f. Carefully review and verify all information in the application and received from outside sources; confirm any credentials required.

g. Note and check any blanks in employment or education history or inconsistencies in information.

h. Seek affirmative statements about job-related personal and moral characteristics, if applicable.

i. Check out and verify or dismiss any rumors.

j. Require each applicant to sign an acknowledgement that providing false, incomplete or misleading information may be grounds for termination.

5. Treat all information gained confidentially and document the investigation thoroughly.

6. Limit the investigation to job-related matters and bear in mind the need to follow fair employment practices and to be sensitive to personal privacy.

END NOTES

1. See discussion of school district liability for child abuse committed by school employees in lawsuits brought under 42 U.S.C. § 1983 and/or Title IX at pages 9-20.

2. Although the U.S. Supreme Court did not explicitly hold in *Franklin v. Gwinett County Public Schools*, 112 S. Ct. 1028 (1992), that a school district would be liable under Title IX for sexual abuse of students by school employees, it did open the door to such liability by ruling that a student may seek monetary damages from the school district based on intentional sex discrimination. In *Franklin* the plaintiff alleged that she had been sexually abused by her coach.

3. See discussion of ethical considerations in making settlement agreements with employees accused of child abuse at page [ ].

4. All 50 states, the District of Columbia and the Department of Defense participate in NASDTEC's Educator Identification Clearinghouse which keeps a listing of names, dates of birth and social security numbers of those individuals whose applications for teacher certification have been denied or whose teaching certificates have been revoked, annulled or suspended because of questionable moral character. The listing is compiled from information provided by each state. Using this listing, a state department of education can check to see if a prospective teacher is on the list and if so, can pursue further investigation to determine what action to take. Local school districts can check teacher applicants against the clearinghouse list by contacting their state education departments.

5. A private investigator later hired by the plaintiffs did discover court records showing one conviction in Dallas County for a Steve Epps, not Stephen Lee Epps.

6. *See also Medlin v. Bass*, 398 S.E. 2d 460 (N.C. 1990). Court found that school district did not engage in negligent hiring since there was no evidence that the district or its superintendent reasonably could have known of the pedophilic tendencies of a principal who allegedly abused a nine year old girl after 16 years of satisfactory performance. Before hiring the principal, the district checked his references and received positive recommendations from his former school district and no indication that he had voluntarily resigned from the former district after being accused of sexually assaulting a student there. No investigation had been conducted to verify the allegations after the principal's resignation. A rumor indicating that the principal was homosexual was investigated by the second district, but no corroboration was obtained.

CHILD ABUSE TRAINING: REDUCING OCCURRENCE AND LIABILITY

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Throughout the years schools have increasingly been used to address a wide array of social problems, such as drug abuse, teen pregnancy, and the AIDS epidemic, in the hope that education will translate into prevention. Schools have evolved naturally into this role because of their professional expertise in teaching and their captive audience of young people. The need for schools to carry out this function with regard to child abuse derives not only from the urgent need for preventive education to protect children but also from its ability to reduce a school's potential liability. In order to serve these two purposes, the school's education and training efforts must be directed at staff, administrators, students, and the community on a continual basis.

STAFF TRAINING

To respond effectively to child abuse, no matter who the perpetrator is, it is absolutely essential that schools adopt, implement, distribute, publicize and follow a comprehensive policy on child abuse. At a minimum it should address issues related to reporting suspected abuse, set forth the appropriate bounds of staff conduct toward students, clearly state applicable due process and disciplinary measures and establish the board's commitment to child abuse training for all staff members.

Reporting and Recognizing Child Abuse

Staff training is often cited as the way to improve the education community's reporting of suspected child abuse. Although all 50 states have laws requiring at least some school staff members to report abuse, past studies indicate that a substantial number of mandatory reporters in schools are either unaware or misunderstand their legal duty to report or are so inadequately informed about it that they cannot carry out their duty effectively. *See generally*, Shoop, R.J. & Firestone, L.M. "Mandatory Reporting of Suspected Child Abuse: Do Teachers Obey the Law?" 46 Educ. L. Rep. 1115-1122 (1988). For example, some teachers fail to report because they erroneously fear liability for good faith reports of suspected abuse that turn out to be unfounded. Others cite their inability to recognize the signs indicating potential abuse as the reason they do not report. Still others hesitate because they feel the school administration does not support or encourage reporting of abuse. Clearly, a well developed in-service program for all staff on the recognition and reporting of abuse would help clear away these obstacles. In addition to explaining the law and board policy and teaching staff about what constitutes reportable abuse and how to recognize it, training sessions should include information on the process to follow in order to report abuse — who to contact, phone numbers, appropriate forms to file, what to include in the report, etc.; confidentiality restrictions and the penalties imposed by law and board policy for failure to report. For more discussion of reporting laws, see pages 33-43.

The majority of states do not have statutory requirements that school personnel receive child abuse training. Review of a statutory survey compiled in 1989 by the National Center on Child Abuse and Neglect of the U.S. Department of Health and Human Services revealed that fewer than 25% of the states mandate such training. *See, e.g.*, Alaska Stat. § 14.14.090(9); Calif. Penal Code §§ 11165.7(b); 11166.5(a), (b); Fla. Stat. Ann. § 236.0811(2)(a)(1); Iowa Code § 232.69(3); N.Y. Educ. Law § 3209-a; Wash. Rev. Code Ann. § 28A.58.255. Approximately half of the other states require the state department of social services, the child abuse prevention board or state board of education to make child abuse education programs available but do not specifically require that teachers and other school personnel receive training. Some have suggested that knowledge of child abuse should be made a condition of employment or part of certification testing for school professionals. A few states have moved in this direction. For example, New York requires that persons applying for superintendents' or teachers' certificates must have completed 2 hours of course work in the identification and reporting of child abuse. N.Y. Educ. Law §§ 3003(4); 3004.

Appropriate Conduct with Students

Because they are vulnerable to child abuse charges, all school employees should receive training in appropriate conduct toward students. Not only will such training provide prior notice of specifically prohibited behavior, but hopefully it will also reduce the overall incidence of abuse and other inappropriate behavior by employees against students. Clearly, all sexual contact between employees and students should be explicitly prohibited in the strongest terms. Employees should also be advised of the school's policy regarding limits on other forms of physical contact with students. In jurisdictions which permit corporal punishment of students, school employees must be informed of the appropriate circumstances for administering physical discipline, the procedures to be followed and the restrictions on the type and amount of force to be used. Specialized training should be given to those school employees, such as security guards, whose jobs routinely entail the physical restraint of students when appropriate. Obviously, even in states that do not define child abuse to include physical maltreatment by persons outside the family, school employees might still be liable civilly and/or criminally for assault and battery or other intentional torts. Excessive corporal punishment has also been the basis of constitutional claims brought under 42 U.S.C. § 1983. *See, e.g., Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980); *Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987); *Fee v. Herndon*, 900 F.2d 804 (5th Cir.), *cert. denied*, 111 S. Ct. 279 (1990).

Penalties and Process

As part of their child abuse training, school employees should also be informed of the possible penalties they could suffer for abusing a student. The process the school will follow when allegations of abuse are made against a school employee should also be explained.

ADMINISTRATOR TRAINING

Because of the key role played by school administrators, their thorough training in the area of child abuse is crucial to encouraging reporting, ensuring compliance with legal requirements and promoting effective response to suspected abuse. Such training can reduce the occurrence, or at least reoccurrence, of child maltreatment and consequently minimize the risk of liability to the district and to the administrators themselves. Some courts, although failing to clearly specify a constitutional basis, have ruled that schools have a duty to protect students from abuse by school employees and that districts may be held liable for "deliberate indifference" to students' constitutional right to bodily integrity. *See, e.g., Stoneking v. Bradford Area School Dist.* (*Stoneking II*), 882 F.2d 720 (2d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990); *Jane Doe A v. Special School Dist.*, 901 F.2d 642 (8th Cir. 1990); *D.T. v. Independent School Dist.*, 894 F.2d 1176 (10th Cir. 1990); *Doe v. Taylor Independent School Dist.*, 975 F.2d 137 (5th Cir. 1992). The Fifth Circuit in *Doe v. Taylor*, citing *Collins v. Harker Heights*, 112 S. Ct. 1061 (1992), states that "deliberate indifference in training employees provides the necessary causal link to hold a municipality liable for the torts of its employees." 975 F.2d at 145.

In addition to the training areas outlined above for all school employees—reporting, appropriate conduct and discipline and due process—administrators because of their supervisory responsibilities should receive training in other areas in order to be able to handle effectively allegations or suspicions of child abuse. The following discussion on recommended topics for administrator training assumes that the school district already has in place adequate policies and implementing regulations.

Reporting

In addition to teaching the legal obligations imposed by reporting laws and how to recognize the indicators of possible abuse, administrator training should include strong warnings not to discourage, censor, delay or retaliate against reporting by other school employees. If school policy gives the building-level administrator the ultimate responsibility of making reports to appropriate authorities, they should be instructed not to suppress any reports merely based on their personal belief that the alleged perpetrator is incapable of committing such a heinous act.

Appropriate Conduct and Penalties and Process

Besides the information provided to all employees in this area, administrators should receive training in recognizing the indicators of potential problem employees and how to respond in order to prevent repeated incidents of inappropriate conduct or escalation in the seriousness of the violation of the employee conduct code. As in all cases of employee misconduct, not just abuse situations, administrators should know the importance of thorough documentation and record keeping as well as adherence to due process and contractual requirements.

Screening and Hiring Employees

To avoid employing individuals who have a history of abusing children, school administrators charged with hiring responsibilities must be thoroughly trained in how to conduct background checks of potential employees. Failure to detect past sexual misconduct by a teacher who later molested several students during the summer was raised as evidence of a policy of deliberate indifference to the students' constitutional rights in *D.T. v. Independent School District*, 894 F.2d 1176 (10th Cir. 1990). Although the court rejected the deliberate indifference claim, this case emphasizes the need for school policy and practice that vigorously pursues background investigations of all employees who will have contact with children. *See* Howard, S. "Protecting Children by Careful Selection of Employees," at [ ] for more discussion of this subject.

Investigation

Administrators or other school employees responsible for investigating allegations of child abuse by school employees should receive specialized training in effective investigative techniques. Such training is absolutely essential given that failure to conduct an adequate investigation has frequently been the asserted basis of school district liability in student molestation cases. *See, e.g., Stoneking; Doe v. Taylor ISD*. Specialized training is also important so that school investigators do not discourage victims from fully reporting by the investigators' negative reaction; contaminate the victim's testimony by asking inappropriate or suggestive questions; or appear to be unduly biased against accused employees. Proper training will also equip the administrator/investigator with the ability to gear interviews to the victim's age, to assess competently the credibility of those she interviews and to assign the appropriate significance to rumors, recantations, or delays in coming forward with the allegations. For more discussion of abuse investigations, see Hungerford, N. "Investigating and Screening of Sexual Misconduct Charges and Coordination with Other Agencies," at [ ].

Interagency Coordination

Training of school administrators in the area of child abuse should entail information on their responsibility to cooperate with other agencies pursuant to state law, school policy or an interagency protocol. Administrators should know the legal limitations on what information can be exchanged among the various agencies and how to secure releases of otherwise protected information when necessary.

In the absence of any formal cooperation requirements, administrators should at least be aware of the legal roles and responsibilities of each of the pertinent agencies and the circumstances when contact and coordination of effort between the school and these other agencies is necessary or appropriate. For more discussion of this topic, see Gittins, N. "Responding to Child Abuse in Schools: Issues in Interagency Cooperation," at pages [ ].

Dealing with the Press and Parents

Because of the sensitive nature of the charges in child abuse cases, school administrators, or those who act as spokesmen for schools, must be well informed about the confidentiality and privacy rights of both employees and students. No information which is protected by law or contractual agreement should be released to the press absent consent from the subject or a court order. Circumspect statements regarding allegations of child abuse can do much to prevent future legal claims asserting invasion of privacy, defamation or deprivation of liberty interests. Not only must school officials know what not to say publicly, but they also must have the skill to convey appropriate information in a manner which convinces the community that the school is acting quickly and vigorously to investigate the allegations.

School administrators must likewise acquire the skills and knowledge to deal appropriately with parents both in situations where the abuse has allegedly been committed by a parent or family member and when the mistreatment has been allegedly committed by a school employee. For more discussion of the issues with which administrators must deal in cases of intrafamily abuse, see Tokarz, J.T. "Legal Issues for Schools Assisting Abuse Victims," at pages [ ]. For more discussion of the issue of dealing with parents in cases of school based abuse, see Hungerford, N. "Investigating and Screening Cases of Sexual Misconduct and Coordination with Other Agencies, at pages [ ]; Gittins, N., "Responding to Child Abuse: Issues in Interagency Cooperation," at pages [ ].

STUDENT TRAINING

It is beyond the scope of this article to discuss all the issues associated with educating children about child abuse; however, from a legal standpoint child abuse training for students may help reduce a school district's liability in several ways. Students' knowledge of how and to whom to report when someone mistreats them is essential to establishing an effective grievance procedure which can quickly respond to abuse complaints. Equipping children with knowledge of what constitutes abuse and how to resist such assaults may help to prevent initial occurrences or at least encourage or enable one-time victims to make reports before the abuse is repeated.

A review of a survey of state child abuse statutes completed in 1989 by the U.S. Department of Health and Human Services revealed that at that time fewer than one quarter of the states had laws encouraging or mandating the availability of child abuse training for students. *See, e.g.*, Ariz. Stat. Ann. § 14.30.360; Fla. Stat. § 415.501; N.J. Stat. Ann. § 18A:35-4.3. Some states make children's participation in child abuse education programs voluntary and allow parents to object. *See, e.g.*, Ill. Ann. Stat. ch. 122, § 27-13.2; Wash. Rev. Code Ann. §§ 28A.03.512; 28A.03.514.

Among the possible areas that could be included in a child abuse curriculum for students are 1)life skills, including socialization, problem-solving and coping; 2)preparation for parenthood; 3)self protection skills, including how to recognize, resist and report abuse by others; and 4)special programs to assist abuse victims. *See* Tower, C. *The Role of Educators in the Prevention and Treatment of Child Abuse and Neglect* 43-53 (U.S. Dep't of Health and Human Services, 1992). This publication also includes recommendations on possible community education programs. *Id.* at 54-55. For more information on the role of schools in the effort to prevent child abuse, see Davidson, H. "What Remains to be Done? Proposals for Legislative and Policy Change," at pages [ ].

SCHOOL EMPLOYEES' LEGAL OBLIGATION TO REPORT SUSPECTED CHILD ABUSE: UNDERSTANDING AND COMPLYING WITH THE LAW

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INTRODUCTION

All fifty states require human service professionals, including public school teachers and administrators, to report suspected incidents of child abuse that come to their attention in their professional capacities. State child abuse reporting laws are listed in Myers, *A Survey of Child Abuse Reporting Laws*, 10 J. Juv. Law 1-72 (1986). (See Appendix [ ] at page [ ] for a list of citations.) All states grant immunity to educators who report suspected child abuse in good faith, and all states provide some sort of penalty, either civil or criminal, for failing to make a mandated report of suspected child abuse.

In spite of the child abuse reporting laws, however, there is substantial evidence that many professionals do not report all child abuse that they come across in the course of their professional duties. For example, a 1992 study found that one third of licensed psychologists who were surveyed had previously failed to report suspected child abuse. S. Kalichman & C. Brosnig, *The Effects of Statutory Requirements on Child Maltreatment Reporting: A Comparison of Two State Laws*. 62 Am. J. Orthopsychiatry 284, 294 (1992). A Rand Corporation study of mandated reporters, including pediatricians, child psychiatrists, social workers, and school principals also reported that one third of those responding to a survey had failed to report suspected child abuse at least one time in their career. G. Zellerman & R. Bell, *The Role of Professional Background, Case Characteristics, and Protective Agency Response in Mandated Child Abuse Reporting* 93 (1990). A 1988 study sponsored by the U.S. Department of Health and Human Services found that although school professionals recognize far more cases of child abuse than any other source, they have one of the lowest rates (24%) of reporting cases of identified abuse to child protective services agencies. *Study Findings on the National Incidence and Prevalence of Child Abuse and Neglect*, 6-11 to 6-19 (U.S. Department of Health and Human Services, 1988).

These studies do not suggest that professionals are indifferent to their reporting obligations; rather, other factors may affect the decision to report. Reporters may sometimes be unclear about the sufficiency of the evidence that requires a report. For example, the study of psychologists found that the more direct the evidence of abuse, the more likely a report would be made. Psychologists were also more likely to report suspected abuse if the victim was quite young—seven years old as opposed to sixteen years old. Kalichman & Brosnig, *supra* at 288. Many professionals, including teachers, also weigh their reporting obligations against the effect of the report on their relationship with children and their parents, and this may influence them not to report suspected child abuse in some cases. *See* Trudell & Whatley, *School Sexual Abuse Prevention: Unintended Consequences and Dilemmas,* 12 Child Abuse & Neglect 103, 106-111 (1988). One study found that teachers were less likely to report suspected child abuse if the principal was perceived as reluctant to report. *Id.* at 111 (citing D. Pelcovitz, *Child Abuse as Viewed by Suburban Elementary Teachers* (1980)). The incidence of reporting may also be affected by lack of administrative support or fear of retaliation. *See* C. Tower, *The Role of Educators in the Protection and Treatment of Child Abuse and Neglect* 39 (U.S. Department of Health and Human Services, 1992). Tower also notes educators may be discouraged from reporting by a previous bad experience with or lack of response from child protective services or other agency. *Id.*

Whatever the cause for failure to report, these findings indicate the need for educators to better understand their legal obligations to report child abuse, not only to reduce their exposure to liability, but also to enable these laws to fulfill their intended purpose of protecting children. The following discussion attempts to clarify the child abuse reporting statutes, identifying who is required to report, when reports should be made, what statutory protections are available for the reporter, and what liability a person might suffer for failing to report. This discussion will be followed by some practice recommendations for implementing the obligations of the child abuse reporting laws.

ADOPTION OF CHILD ABUSE REPORTING LAWS

States began passing mandatory child abuse reporting laws in the 1950s. Initially, the statutes focused primarily on physicians. In 1974, Congress passed the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-16, which required states to pass certain legislation dealing with child abuse in order to qualify for federal funds to be used to combat child abuse. Among the required provisions is a mandatory duty on service professionals to report known or suspected child abuse. 45 C.F.R. § 1340.14(c). All 50 states have now passed some sort of child abuse reporting legislation modelled on the guidelines in the federal regulations.

The following discussion will attempt to clarify and explain the duties imposed by the mandatory reporting laws. Specific statutes examined are those of Alaska, California, Florida, and Illinois.

MANDATORY REPORTERS

Most state statutes target human service professionals as mandatory reporters. The most common occupations subject to reporting requirements are those in the areas of health care, education, child care, social work, and law enforcement. People in these professions are most likely to encounter abused children and to have the knowledge about how to detect abuse. School teachers, counselors, nurses, and administrative staff are all required to make mandatory reports. In all states reviewed, the statute expressly identifies those human service professions required to report.

Along with identifying mandated reporters, these statutes also include provisions that permit any person to report child abuse. AS § 47.17.020(b); Cal. Penal Code § 11166(d); Ill. Rev. Stat. § 23.2054. Like mandatory reporters, non-mandatory reporters are given immunity from liability resulting from their reports. AS § 47.17.050; Ill. Rev. Stat. § 23.2059; Cal. Penal Code § 11172.[1]

Courts have construed this mandatory duty to report very strictly. A reporter has the duty to report due to his or her occupation, not because of any relationship with the abused child that occurs while on duty. For example, in most states psychotherapists are required to report abuse, even if their source of information arises during treatment as part of the confidential communications with the patient. In almost every state the duty to report overrides the privilege of confidentiality. *E.g., Pesce v. J. Sterling Morton High School*, 830 F.2d 789 (7th Cir. 1987) (state law requirement that school psychologist report child abuse does not infringe any federal right of confidentiality); *People v. Stritzinger*, 194 Cal. Rptr. 431, 668 P.2d 738, 3 Cal.3d 505 (1985).[2] Similarly, concern for the invasion of family rights is no defense to the mandatory duty to report. *See, e.g., People v. Corbett*, 656 P.2d 687 (Colo. 1986) (marital privilege cannot be invoked to exclude wife's testimony in case involving alleged assault on wife's minor sister). The duty to report is absolute, and there are no legal defenses that will excuse the failure to report.

REPORTABLE ABUSE AND NEGLECT

Federal regulations specify that in order to receive federal grants, state child abuse laws must define the reportable mistreatment of children in accordance with the federal definition. The federal regulations define child abuse and neglect as "the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child." 45 C.F.R. § 1340.14(b). The regulations leave it to the state to define child.

Many states have adopted definitions of neglect and abuse that follow the definitions in the federal regulations. For example, AS § 47.17.290(2) defines "child abuse or neglect" to mean "the physical injury or neglect, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby." Other states, like California, Florida, and Illinois, define abuse more specifically, while also including general definitions. Most statutes define physical abuse as a non-accidental injury, under circumstances which indicate that the child's "health or welfare is harmed or threatened." Others expressly describe additional types of physical abuse. For example, Illinois, California, and Florida all include excessive corporal punishment as a form of child abuse. Illinois adds torture to the definition; California adds "willful cruelty".

A few states require that the injury be severe. Florida, for example, defines physical injury rather strictly as "death, permanent or temporary disfigurement, or impairment of any bodily part." Fla. Stat. § 30.415.503(11). All states leave the determination of what injuries constitute child abuse to the investigative body. School personnel should not attempt to make any determinations about the severity of the harm or threat to the child. One court has held that the child abuse laws apply to all but negligible or *de minimis* injuries to children. *April K. v. Boston Children's Service Ass'n*, 581 F. Supp. 711 (D. Mass. 1984).

Some states also require the reporting of neglect. The statutes generally mirror each other in defining neglect as the failure to provide the child with adequate food, clothing, shelter, or health care by a person responsible for the child's welfare. AS § 47.17.290(10); Cal. Penal Code § 11165.2; Fla. Stat. § 30.415.503(7)(f); Ill. Rev. Stat. § 23.2053. Both California and Florida also include the failure to adequately supervise the child. Cal. Penal Code § 11165.2 (b); Fla. Stat. § 30.415.503(7)(e). Some states exclude certain family practices from the definition of abuse or neglect. For example, Colorado law requires child abuse investigators to take into account the child-rearing practices of the culture in which the child participates. Colo. Rev. Stat. § 19-3-303(1)(b). In other states the failure to provide medical care due to legitimate religious beliefs is not neglect. Cal. Penal Code § 11165.2; Fla. Stat. § 30.415.503(7)(f); Ill. Rev. Stat. § 23.2053. Rhode Island's reporting law permits a child's parents and physician to discontine the use of life-support systems for a child who is terminally ill if the physician believes the child has no reasonable chance of recovery. R.I. Gen. Laws § 40-11-3(c).

Many of the statutes also include "harm or threatened harm to a child's physical or mental health" as a reportable condition. Fla. Stat. § 30.415.503(3). In addition, psychological abuse is a form of reportable child abuse. California provides that mental suffering may be reported although the mandatory reporters are not required to report it. Cal. Penal Code § 11166(b). However, California also includes willful cruelty as part of its definition of child abuse. Willful cruelty is defined as "a situation where any person willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering". Cal. Penal Code § 11165.3.

All states include sexual abuse and exploitation within their definition of child abuse. Sexual abuse is usually defined by reference to state criminal laws on child sexual exploitation. For example, the Illinois statute defines sexual abuse as "any sex against such child, as such sex offenses are defined in the Criminal Code." Ill. Rev. Stat. § 23.2053(c). The corresponding statutes for Florida and California are found in Fla. Stat. § 30.415.503(7)(b)-(c) and Cal. Penal Code § 11165.1.

Defining sexual abuse in the context of criminal laws may sometimes be a source of confusion. Most criminal codes attempt to prohibit any sexual conduct with children below the age of consent. However, a person may have reached the age of consent with regard to willing sexual relations, while still being a child for the purposes of an obligation to report with regard to neglect, physical abuse, non-consensual sex, and health dangers associated with consensual sex. Thus, even though the child has reached the age of consent, sexual contact should be reported due to a threat of emotional or health risk as a result of exposure to sexually transmitted diseases or HIV.

Some states have imposed reporting requirements based on the mere fact of sexual relations, whether voluntary or not, where the child is under the age of consent. Some states may interpret peer sexual activity as abuse under some circumstances. For example, according to Michigan law, pregnancy or venereal disease of a child less than 12 is "reasonable cause to suspect child abuse and neglect have occurred." Mich. Code § 722.623(8).

The California child abuse reporting statute includes violations of a statute which prohibits "lewd or lascivious acts by a child under 14 years of age" in its definition of child abuse. Based on this definition, the California Attorney General released an opinion that any evidence of sexual activity in a child under 14 must be reported. However, one California court held that the mere fact of sexual activity by a minor under 14 was an insufficient basis for reporting child abuse, especially if the sexual partner was the same age. *Planned Parenthood Affiliates v. Van de Kamp*, 226 Cal. Rptr. 361 (App. 1986). This includes evidence such as the seeking of birth control, prenatal care, abortions, or treatment for sexually transmitted diseases. *Id.* at 366, 371-72. Instead, the court held that the professional must make a judgment as to whether the relations are voluntary or abusive. *Id.* at 375. Another California court held that if the clinic knew or had reason to suspect that abuse was involved, such as illegal sexual involvement with an older partner or the presence of certain sexually transmitted diseases that are commonly spread by those over 14, it could give rise to a reasonable suspicion of abuse triggering the reporting requirement. *People v. Stockton Pregnancy Control Medical Clinic*, 249 Cal. Rptr. 762 (App. 1988).

These two California cases illustrate the difficulties in deciding whether to report peer sexual activity if state law does not directly address the matter. In an age where AIDS is increasing rapidly in the teenage population, reporting of peer sexual activity may be appropriate. For example, if a 13-year old girl contacts the school nurse and asks to be tested for AIDS, this may be sufficient evidence that the child has been put at risk by sexual relations to justify a report of suspected child abuse, even if the sexual activity was with a peer.

Some states, California, for example, have provided that child abuse may be committed by any person. Cal. Penal Code § 11165.6.[3] Other states have limited their definition of child abuse to acts or omissions of persons who are responsible for a child's welfare. Florida law provides that child abuse is caused "by the acts or omissions of a parent, adult household member, or other person responsible for the child's welfare." Fla. Stat. § 30.415.503(3). Illinois provides that child abuse is committed by a "parent or immediate family member, or any person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent". Ill. Rev. Stat. § 23.2053. In these states, abuse that is committed by someone outside the definition of the statute, even if it is someone in a position of authority due to the person's age or relation to the child, is not considered child abuse.[4] For example, in *D.A.O. v. Dep't of Health & Rehab. Services*, 561 So.2d 380 (Fla. App. 1990), a boy had sex with his niece over a five year period, when she was between five and eleven years old and he was between thirteen and nineteen years old. The boy was successful in getting his name removed from the central registry of child abusers. The court held that since the abuse occurred in his parent's home rather than his own, and the boy never had the legal authority to control his niece, the abuse was not child abuse under the statute.

Many statutes include "maltreatment" as reportable conduct that may damage a child which need not be committed by the child's parent, custodian, or guardian. AS § 47.17.290(8). Maltreatment is usually not defined in the statutes. An operational definition of maltreatment is "an act or omission that results in circumstances in which there is reasonable cause to suspect that a child is in need of aid".

Even in states in which child abuse is defined as caused by a parent or other person responsible for the child, the reporter need not have knowledge of who injured the child. Most statutes require a report if the injury lacks reasonable explanation. In *Capaldi v. State,* 763 P.2d 117, 119 (Okla. Crim. 1988), the court held that the existence of non-accidental injuries was enough to require a report. The court found that negligent failure to prevent harm would constitute "reason to believe" a child received negligent care.

Other cases have held that it is irrelevant whether the abuse was committed by someone the reporter believes is covered by the child abuse reporting laws, since the purpose of the reporting requirement is to protect children. In *Matter Of Schroeder*, 415 N.W.2d 436 (Minn. App. 1987), a psychologist argued that he did not have a duty to report his patient's sexual abuse, because the perpetrator was not covered by the state's criminal law definitions of sexual abuse. The court held that this did not matter under the reporting requirements of the state child abuse law.

WHERE TO MAKE REPORTS

Under federal regulations, state statutes must require that reports be made to "a properly constituted authority." 45 C.F.R. § 1340.2(a). This is defined as "an agency with the legal power to perform an investigation and take necessary steps to prevent and treat child abuse and neglect". Although the authorities to which reports must be made vary from state to state, the most common procedure is for reports to be made to the state department which deals with child welfare, or if the department cannot be reached, to the police. *See e.g.*, AS § 47.17.020(a)-(c). Some states will accept reports to either, *see, e.g.*, Cal. Penal Code § 11166(a); others have set up toll free numbers for a reporter to call. *See, e.g.*, Fla. Stat. § 30.415.504(2)(a).

Courts have interpreted the requirement that reports be made to a state department or law enforcement office strictly. For example, one court held that reporting only to a superior, even if that is the policy of the institution, violates state law because the report was not made to the proper authorities. *Capaldi v. State*, 763 P.2d at 120. In the school environment, teachers, counselors, and administrators should remember that the duty to report rests on each of them individually. Thus, a supervisor should not discourage a school employee from filing a report, even if the supervisor has doubts about the need for one. However, where a teacher, nurse, and principal may be involved with the same student, one report will suffice as long as the report is clearly made on behalf of each person.

The agency to which a report must be made may change depending on the identity of the abuser. In most states, if the perpetrator of the abuse is a parent or one responsible for the child's welfare in a home environment, the report must be made to the social service agency that would intervene to protect the child. When the perpetrator is unknown, some states require the report to be made to the local police department. For example, Alaska statutes provide that a mandatory reporter who "has cause to believe that a child has suffered harm as a result of abuse, shall promptly report the harm to the nearest law enforcement agency if the person making the report (1) has cause to believe that the harm was caused by a person who is not responsible for the child's welfare; or (2) is unable to determine (A) who caused the harm to the child; or (B) whether the person who is believed to have caused the harm to the child has responsibility for the child's welfare." AS § 47.17.020(e). Other states have similar provisions requiring that reports be made to law enforcement agencies.

DEGREE OF KNOWLEDGE THAT TRIGGERS A DUTY TO REPORT

Federal regulations require that state reporting statutes provide for reporting not only known, but also suspected, abuse. 45 C.F.R. § 1340.14(c). Most states have adopted a "reasonable cause to believe or suspect" standard which triggers the duty to report. Most statutes make no attempt to define reasonable belief or suspicion.

In Alaska the statutory language is whether a mandated reporter has "reasonable cause to suspect." AS § 47.17.020(a). The standard in California is whether the reporter "knows or reasonably suspects" that the child has been the victim of abuse. Cal. Penal Code § 11166(a). In Florida, the statutory language is whether the reporter "knows or has reasonable cause to suspect" the abuse. Fla. Stat. § 30.415.504(1). In Illinois, the standard is whether the mandated reporter has "reasonable cause to believe a child may be an abused child or a neglected child". Ill. Rev. Stat. § 23.2054.

Although these standards may not be defined, they are all intended to be objective. A good operational definition of the "reasonable cause to suspect" standard is as follows: cause, based on all the facts and circumstances known to the person, that would lead a reasonable person to suspect that something (abuse, neglect, etc.) may have occurred. It does not matter whether the person actually suspects child abuse, if he or she is aware of circumstances that should lead a reasonable person in a like position to suspect child abuse. One court has ruled that the "reasonable cause to believe" standard is meant to establish a low threshold for reporting and implies a minimum level of accuracy. *Care and Protection of Robert*, 408 Mass. 52, 556 N.E.2d 993 (1986). In *State v. Grover,* 437 N.W.2d 60, 63 (Minn. 1989), the court held that "a mandated reporter who has reason to know or believe that a child is being or has been abused, but fails to recognize it,. . . violates the statute". The court held that even if the reporter does not believe that the abuse is occurring, if he or she *has reason to suspect* that it is (such as from an accusation of the child), a report is required. *Id*. at 64. In short, a suspicion or apprehension is enough to trigger a report. The reporter has no duty or obligation to verify the truthfulness of the facts or circumstances which give rise to the suspicion. But, the reporter should be able to articulate or express the facts, circumstances, or inferences that give rise to the belief or suspicion.

California law makes clear that reports are required if there is a reasonable suspicion of abuse. The statute defines "reasonable suspicion" as when "it is objectively reasonable for a person to entertain such a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect child abuse". Cal. Penal Code § 11166(a).

In criminal prosecutions for failure to report, several defendants have challenged the "reasonable cause to suspect" standards for vagueness. In *State v. Hurd,* 400 N.W.2d 42, 45 (Wis. App. 1986), a Wisconsin court held that the standard was sufficiently clear and meant that abuse must be reported if a prudent person would have had reasonable cause to suspect child abuse if presented with the circumstances and facts known by the person who has the duty to report.[5] However, the Nevada Supreme Court stated that it was unsure whether a duty to report based on "a reason to believe" would survive a due process challenge on vagueness grounds since it did not allow for the exercise of professional judgment or even a minimal investigation. *Sheriff, Washoe County v. Sferrazza*, 766 P.2d 896, 897 (Nev. 1988). The statute was struck down as being unconstitutional on other grounds.

WHEN A REPORT SHOULD BE MADE

Most states require that reports be made "immediately". AS § 47.17.020(a); Cal. Penal Code § 11166(a); Fla. Stat. § 30.415.504(2)(a); Ill. Rev. Stat. § 23.2054. In *Matter of Schroeder*, 415 N.W.2d at 436, for example, the court held that a psychologist who waited five weeks before reporting had violated the requirement that suspected abuse be reported immediately.

However, another court struck down its state reporting statute as unconstitutionally vague since "immediately" could have different meanings at different times. The court added that the requirement could actually act as a disincentive to reporting because of the fear of being prosecuted for not reporting immediately. *Sheriff, Washoe County v. Sferrazza*, 766 P.2d 896, 897 (Nev. 1988).

Although state laws do not define "immediately", a good operational definition is within 24 hours. The important thing for educators to remember is that the reporting laws require mandated reporters to make their reports as soon as a case of suspected abuse comes to their attention. As stated earlier, the threshold for reporting is intended by these statutes to be low. School officials should not conduct an internal investigation before reporting if it delays a report by more than 24 hours or increases a child's risk of harm. Nevertheless, the fact that a report was delayed should not deter a school employee from filing a late report. Both in terms of avoiding liability and protecting children, a late report is better than no report at all.

LIABILITY FOR NOT REPORTING

Most states impose criminal or civil liability on human service professionals who do not comply with the duty to report. The liability is usually in the form of a misdemeanor charge. AS § 47.17.068; Cal. Penal Code § 11172(e); Fla. Stat. § 30.415.513(1); Ill. Rev. Stat. § 23.2054. A few states also allow civil liability for injuries proximately caused by the failure to report. *See e.g.*, Mich. Comp. Laws § 722.633(1); Colo. Rev. Stat. § 19-3-304(4).

Although most states impose an objective standard in order to describe who is required to report under the statutes, they do not impose criminal liability on someone for negligently failing to report abuse. In order to prosecute someone for not reporting child abuse, most states provide that the failure to report must be done willfully or knowingly. For example, in both Florida and Illinois, the failure to report must be "knowingly and willfully," and in Alaska the failure to report must be "knowingly." Fla. Stat. § 30.415.513(1); Ill. Rev. Stat. § 23.2054; AS § 47.17.068.

It may be difficult to prove that defendants had the willful or knowing intent not to report child abuse. In one case, the court allowed the defendants to raise a defense such as mistake, neglect, or misadventure. *State v. Hurd*, 400 N.W.2d at 42, 47 (Wis. App. 1986). Under this analysis, the failure to recognize that there was a reasonable cause to suspect abuse may be a defense. Thus, in some jurisdictions a showing of the willful and knowing failure to report may require evidence of a cover-up or complete indifference to a child's obvious need for help.

However, in a Michigan case, the court held that a defendant who had failed to report under circumstances in which the defendant should have had reasonable suspicions of abuse, but had decided that the suspicions were not factually grounded, had not presented an adequate defense to the charge that he had knowingly failed to report child abuse. *People v. Cavaiani*, 432 N.W.2d 409 (Mich. App. 1988).

Other states have lesser standards for imposing liability for failing to report child abuse. The California Penal Code requires only that a person fail to report an instance of abuse which "he or she knows to exist or reasonably should know to exist." Cal. Penal Code § 11172(e). Some states require only a violation of the duty to report. Minnesota law, for example, provides that a mandatory reporter is guilty of a misdemeanor for failing to report if he or she "knows or has reason to believe that a child is neglected or physically or sexually abused." Minn. Stat. § 626.556, subd. 6 (1991). Under these statutes, liability is easier to impose.

Plaintiffs in several suits have argued that the existence of a duty to report child abuse, as imposed by the statutes, should give rise to civil liability for injuries proximately caused by the failure to report, even in states which do not provide for this in their statutes. In most cases, the courts have held that the statute alone does not create a private cause of action. *See, e.g., Kansas State Bank v. Specialized Transp. Serv.*, 819 P.2d 587, 603-04 (Kan. 1991); *Fisher v. Metcalf*, 543 So.2d 785 (Fla. App. 1989); *Jane Doe "A" v. Special Sch. Dist. of St. Louis County*, 637 F. Supp. 1138 (E.D. Mo. 1986). However, in *Landeros v. Flood*, 123 Cal. Rptr. 713, 724-25 (App. 1975), the court held that the violation of a reporting statute could give rise to civil liability. The decision cited California Rule of Evidence 669, which provides that the failure to exercise due care is presumed when a person violates a statute and that violation proximately causes death or injury from an occurrence which the statute was designed to prevent and to a member of the class which the statute was enacted to protect.

Some plaintiffs have attempted to hold school districts liable for failing to protect a child from physical or sexual abuse by filing civil rights lawsuits alleging constitutional violations. Several of these suits have alleged, either explicitly or implicitly, that school officials failed to report child abuse to proper authorities. *See e.g.*, *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745 (5th Cir. 1993), *Thelma D. v. Board of Educ. of St. Louis County*, 934 F.2d 929 (8th Cir. 1991); *Stoneking v. Bradford Area Sch. Dist.* 882, F.2d 720 (3d Cir. 1989), *cert. denied,* 493 U.S. 1044.[6]

So far, no court has held a school district liable for a constitutional deprivation based on an explicit finding of failure to report child abuse to proper authorities. In a 1993 decision, the Fifth Circuit held that a school district's conscious decision to transfer a teacher accused of child abuse rather than remove him from the classroom or report the abuse to authorities could constitute a policy upon which liability under 42 U.S.C. § 1983 could be predicated. However, the court ruled that liability would only attach if the policy manifested deliberate indifference to the child's constitutional rights, and that the facts of the case established that the school board had not acted with such indifference. *Gonzalez*, 996 F.2d 745.

PROTECTION FOR THE REPORTER

All states provide that a reporter is immune from liability stemming from a report made in good faith. This immunity also extends to professional services rendered in connection with the identification of child abuse. In *Krikorian v. Barry,* 242 Cal. Rptr. 312, 318-19 (App. 1987), actions for professional negligence and intentional infliction of emotional distress were defeated. The court held that the immunity must necessarily extend to these professional services, or else the reporting requirement would still give rise to fear of liability.

Although some states grant absolute immunity for reporting to all required reporters, *see e.g.*, Cal. Penal Code § 11172(a), most states only allow immunity for good faith reports.[7] All states have either an explicit or implied presumption of good faith for people who report child abuse under the reporting statutes. *See, e.g.*, AS § 47.17.050.

A few states have held that a report is in bad faith if the reporter can show no reasonable grounds for which the report could be made. *See, e.g., McDonald v. Children's Serv. Div.*, 694 P.2d 569 (Or. App. 1985). Most states, however, have held that a showing of malice is necessary to show that a report was made in bad faith. *See, e.g., Brown v. Farkas*, 511 N.E.2d 1143 (Ill. App. 1986); *Miller v. Beck*, 440 N.Y.S.2d 691 (App. 1981).

Most state statutes contain provisions that employers cannot retaliate against employees for reporting. These provisions are not entirely effective, however, since it is often difficult to prove that an employer's action was in response to the employee's report. In *Raposa v. Meade School District 46-1*, 790 F.2d 1349 (8th Cir. 1986), for example, a teacher filed a Section 1983 case against the school district that reassigned her due to parental hostility after she made a child abuse report. The court held that the reassignment was not punishment; and because of special circumstances, such as the very small size of the school and the effect of parental hostility on the teacher's effectiveness, the reassignment did not violate her constitutional rights.

Finally, several statutes provide that someone who makes a child abuse report which they know is false, is guilty of a misdemeanor. *See, e.g.*, Ill. Rev. Stat. § 23.2054; La. Rev. Stat. § 403(A)(3).

CONFIDENTIALITY ISSUES

States are concerned with the confidentiality of those accused of child abuse or neglect. There is also a concern with protecting the identity of the reporters to foster and encourage a willingness to report. Federal regulations require states to maintain the confidentiality of reports of suspected child abuse and neglect as well as the records of child abuse investigations. 45 C.F.R. § 1340.14 (i).

This interest in confidentiality does not apply to keeping the suspicions secret from proper authorities, however, even if they developed in the context of a usually privileged relationship. All states have abrogated the privileged relationships for the sake of the reporting requirements, either explicitly or implicitly, and many have abrogated the privileges for the sake of judicial proceedings as well. Myers, *A Survey of Child Abuse Reporting Laws*, 10 J. Juv. Law 1, 4 (1986). These provisions have frequently been challenged as a violation of privacy or self-incrimination, and upheld. *See, e.g.*, *People v. Younghanz*, 202 Cal. Rptr. 907, 911 (App. 1984).[8]

PRACTICE RECOMMENDATIONS

Understanding and complying with the child abuse reporting laws must be a high priority for school administrators and their legal counsel. Failure to comply with these laws can lead to civil or criminal liability for a neglectful school official, and it can also increase the harm to a child living in an abusive environment. To better ensure that the laws are followed and that the school district's exposure to liability is minimized, school officials and their attorneys should implement these recommendations:

- **Identify Mandatory Reporters.** Thoroughly review the state child abuse reporting laws to determine who is responsible for making a mandatory report of suspected abuse in the school environment. In most jurisdictions, a teacher's legal obligation to report is not discharged by informing the building administrator of suspected abuse.

- **Develop and Distribute Policy on Child Abuse.** All mandatory reporters should be informed of their obligation to report in school policy and at appropriate in-service training sessions. Develop concise, written summaries and explanations of the reporting requirements and procedures to follow in making a report. Distribute these summaries to every teacher, counselor, aide, and administrator in the school system. An example of the type of written procedures and information on the reporting can be found in Appendix [?] at page [ ].

The school should also adopt and distribute a policy which clearly prohibits any sexual contact between school employees and any K-12 student, regardless of the student's age. It should explicitly provide that violation of this prohibition may lead to dismissal.

- **Document Reports in Writing.** Whether or not state law requires that a mandated report be reduced to writing, school officials should make sure that there is written documentation of the report, including the name of the person who made the report, the person who received it, and the date and time that the report was made. An example of a school district reporting form is reproduced in Appendix [?] at page [ ]. These written reports should be maintained as part of the school district's personnel records.

- **Require Reporters to Inform Administrators.** A child abuse report may trigger an investigation by the police or child welfare workers, and investigators may visit the school. School policy should require every school employee who makes a report to inform the building administrator as well. This will alert the administrator to the possibility of a child abuse investigation in the school.

- **Develop Interagency Cooperation Agreements.** Establish a working agreement and understanding with your local social service agency and police department on how child abuse investigations will be conducted and what will be expected of school personnel during these investigations. Such an agreement should address who will be responsible for notifying a suspected victim's parents, and when the parents will be notified. School personnel are usually anxious about permitting student interrogations on school grounds without prior notification and consent of the parents. Unless a parent is the suspected abuser, parents should be notified before a child is questioned about suspected incidents of serious physical or sexual abuse.

Some police and child welfare investigators allow school representatives to participate in child abuse interviews that take place on school premises. Others do not. School officials and outside investigators should develop a protocol in advance with regard to this issue rather than negotiate after a child abuse report has been made. If possible, school officials should attend all interviews of children that take place in the school to make sure the interviews are conducted appropriately. *See* Gittins, *Responding to Child Sexual Abuse in the Schools: Issues in Interagency Cooperation*, at pages [ ].

- **Provide Training.** All school employees should receive in-service training on the mandatory reporting requirements, procedures, and policies in the district.

Principals should clearly understand that they should not discourage a teacher from making a report, even if the incident is one which the principal does not believe requires a report. If there is doubt about the sufficiency of evidence, err on the side of reporting. There is no penalty for over reporting.

Nurses and school counselors should be informed that medical and counselling privileges are superseded by the child abuse reporting laws and that they are required to report suspected abuse that they come across in their medical or counselling relationships.

- **Report Abuse by School Employees to Each Agency Required by Law.** If the suspected abuser is a teacher, school authorities may be required to report to state licensing authorities as well as to the police or the child welfare agency. If so, this report should also be made and documented in writing. Settlement agreements between school districts and teachers accused of child abuse do not relieve school officials of their responsibility to make mandatory reports. *See* Fossey, *Confidential Settlement Agreements Between School Districts and Teachers Accused of Child Abuse: Issues of Law and Ethics*, 63 Ed. Law. Rep. 1, 6 (1990), reprinted herein at pages [ ].

- **Notify Legal Counsel and Insurance Carrier.** If there is any possibility that an allegation of suspected child abuse will expose the school district to liability, district officials should notify their legal counsel and insurance carrier. In particular, the school attorney and the insurance carrier should be notified of all allegations of child abuse by school employees. For a discussion of insurance issues in school child abuse cases, see Martin, "The Sexual Abuse Claim: Is it Covered?" at pages [ ].

- **Do Background Checks.** Procedures for complying with the child abuse reporting laws should be part of a comprehensive policy of protecting school children from abuse, particularly abuse by school employees. One of the most important things a school district can do to prevent child abusers from becoming school employees is to conduct thorough background investigations of job applicants. Implementing these recommendations will reduce the likelihood that a child abuser becomes a school employee.

    - Employment application forms should be reviewed to make sure job applicants are required to list all previous employers and to account for periods of unemployment.

    - If your state has an employee screening law—fingerprinting procedures, or a criminal record check, for example—the school district should take full advantage of it. *See generally,* Davidson, *Protection of Children Through Criminal History Record Screening: Well-meaning Promises and Legal Pitfalls*, 89 Dickinson L. Rev. 577 (1985).

    - School districts should contact the former employers of any job applicant who will have contact with children. Do not simply call the people that an applicant lists as references; contact the applicant's direct supervisors as well. School districts can be sued for negligent hiring if an employee with a history of child abuse molests a child in their district. Therefore, it is important to conduct thorough background investigations of prospective employees and to maintain written records of all persons contacted in connection with any hiring decision.

For more discussion of the issues concerning background checks of prospective employees, see Howard, "Protecting Children By Careful Selection of Employees," at pages [ ].

CONCLUSION

In assisting school districts to comply with child abuse reporting laws, school attorneys can do their clients a great service by making clear to them that the child abuse reporting laws delegate the authority for investigating suspected abuse to child welfare agencies and the police, not to school officials. Once school officials have crossed the low threshold of suspecting that child abuse may have occurred, they should report quickly. In particular, school officials should not delay a report in order to conduct their own investigation if there is any possibility that a delay may increase the risk to the child. If school administrators have any doubts about the necessity of reporting, they should discuss their concerns with legal counsel on an urgent basis.

Of course, school districts have an independent obligation to investigate child abuse when the accused abuser is a school employee. In these cases, school officials should seek access to the results of police or child welfare agency investigations in order to make their own determination of whether an employee should be disciplined or dismissed. For a thorough discussion of the practical aspects of investigating child abuse by school employees, see Hungerford, "Investigating and Screening Sexual Misconduct Charges and Coordination with Other Agencies," at pages [ ]; Fossey, *Child Abuse Investigations in the Public Schools: A Practical Guide for School Administrators,* 69 Ed. Law. Rep. 991 (1991).[9]

END NOTES

1. The California Penal Code does differentiate between required and permitted reporter in the immunity clause. Required reporters are entitled to absolute immunity from liability resulting from the report, but permitted reporters are only immune to the extent that they did not know a report was false or act with reckless disregard of its truth at the time.

2. Although most state reporting laws specifically state that the reporting requirement supersedes various types of privileged communications, school administrators should become familiar with status of privileged communications in their respective states. At least one state, Oregon, does not require psychiatrists and psychologists to report privileged communications with patients. Or. Rev. Stat. § 415.750.

3. This provision explicitly excepts reasonable force used by law enforcement officers in the line of duty and injuries occurring in "a mutual affray between minors", however.

4. This discussion refers primarily to physical or emotional abuse, and in some cases sexual abuse. All states define neglect as committed by a person having responsibility for the child's welfare. In many cases, sexual abuse is also governed under separate standards, based on the criminal statutes to which the reporting statute refers. For example, in Alaska, some types of sexual abuse can be committed by a person with no relation to the child. *See, e.g.*, A.S. § 11.41.34(a) (being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years or age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person).

5. *See also, People v. Cavaiani,* 432 N.W.2d 409 (Mich. App. 1988), and *State v. Grover,* 437 N.W.2d 60 (Minn. 1989), in which courts addressed vagueness challenges like that in *Hurd* and decided them similarly.

6. For more discussion of cases raising civil rights claims against schools in cases involving child abuse, see Gregory, G. "Child Abuse in Schools: Responsiblity under Federal Law," at pages [ ].

7. *See also*, discussions of California's absolute immunity provision in *Krikorian v. Barry*, 242 Cal. Rptr. 312, 314 (App. 1987) and *Storch v. Silverman*, 231 Cal. Rptr. 27, 33 (App. 1986). California law also provides that a reporter sued despite the absolute immunity provision and who prevails may present a claim for attorney's fees. Cal. Penal Code § 11172(c).

8. *See also generally, State v. R.H.*, 683 P.2d 269 (Alaska Ct. App. 1984) (communications between clinical psychologists and patient were privileged in context of criminal proceedings, but physician/patient privilege was abrogated for purposes of child protection proceedings).

9. *See also generally,* Frels, K., Bump R., and Horner, J., *Investigating Alleged Wrongdoing by Employees in the School Setting* (NSBA 1990).

RESPONDING TO CHILD ABUSE IN THE SCHOOLS: ISSUES IN INTERAGENCY COOPERATION

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INTRODUCTION

Many recent efforts at improving the well-being of children in our society have focused on how public agencies can work together in order to eliminate duplication, to close gaps and to make services more responsive to individual needs.[1] These collaborative efforts are becoming more frequent in how government responds to cases of child maltreatment, with many state codes explicitly mandating interagency cooperation and providing mechanisms for shared communications where confidentiality rules might otherwise discourage information exchange. While these state statutory provisions usually call for coordination between child protective services (CPS) departments and law enforcement entities such as the police and local prosecutors, school involvement in such cases is becoming more common and is of absolute necessity when the abuse is alleged to have been committed by a school employee.

This article will examine the legal and practical issues school officials should consider in handling a case of abuse allegedly committed by a school employee and suggest ways in which schools can work with the other parties involved in order to best serve the needs of the child while not neglecting their own obligations nor unduly interfering with the interests and responsibilities of others.[2] While this discussion will focus primarily on cooperation at the investigative stage, its purpose is not to give comprehensive advice on appropriate investigative techniques.[3]

The interests of the parties vary with the type of maltreatment involved and the current status of the case. These factors can, of course, affect how easily coordination and collaboration are achieved. While all the parties may agree that the child's welfare is paramount, each agency has its own perspective on how best to promote that interest and meet its own legal obligations. A school district, in addition to addressing concerns about the individual child involved, must also act to protect the health, safety and welfare of all its students. This could require the removal and eventual termination of the employee, if the charges are true. To take such action, the school district must have supporting facts gathered through a thorough investigation. Adequate investigations are absolutely essential to protecting the interest of the child, the accused employee and the school district by either providing evidence to support the discharge of an employee who has actually abused a student or by discovering that the allegations are unfounded. In either case, the school district has demonstrated that it exercised due care in handling the abuse complaint, thereby minimizing its exposure to liability claims.[4]

The school district's handling of abuse allegations may at times conflict with the responsibilities of CPS or law enforcement. In addition to child abuse reporting laws, school officials who receive an abuse complaint must comply with established policies, procedures, collective bargaining agreements and state education codes—none of which apply to the other agencies. The goals of CPS workers focus primarily on determining whether or not statutorily defined child abuse or neglect has occurred and on taking necessary actions to protect and treat the child. Law enforcement agents must determine whether any criminal violation has occurred and whether sufficient evidence exists to prosecute the accused for the alleged offense. When conflicts do arise, school officials must be able to resolve the issues without compromising the district's ability to meet its own legal responsibilities. The following information may assist schools in this regard.

STATE COOPERATION STATUTES

Many states have recognized the necessity and importance of interagency cooperation in dealing with child abuse and have enacted statutes to encourage and facilitate collaboration.[5] These statutes represent a critical step in facilitating the coordination of agency efforts in abuse cases but do contain a number of shortcomings from the perspective of a school faced with responding promptly and effectively to a report of alleged abuse of a student by a school employee.

Cooperation Mandates

Although numerous states have enacted laws mandating cooperation between agencies in the handling of abuse cases, only 13 specifically mention schools or education agencies as participants in the specified collaborative efforts (other than child protection teams, discussed below). *See, e.g.,* Conn. Gen. Stat. § 17-38f; Fla. Stat. § 415.509; Iowa Code § 232.71(5), (6); Kan. Stat. Ann. § 38-1523 (b), (f), (g); Mich. Comp. Laws § 722.628(8); N.J. Stat. Ann. § 9:6-8.72a; Pa. Stat. Ann. tit. 11, § 2218; Tex. Fam. Code § 34.06; Wash. Rev. Code § 26.44.030. Other states do not explicitly refer to schools in their cooperation statutes but probably encompass them through broad categories such as, "other state and local departments, agencies, authorities and institutions shall cooperate. . ." Va. Code Ann. § 63.1-248-17. *See also* Haw. Rev. Stat. § 587-84 (every public official must render all assistance); Ind. Code § 36-6-11-10(c) (child protective services shall cooperate with and shall seek and receive cooperation of appropriate public and private agencies); Minn. Stat. § 256.01(4) (Commissioner of human services shall assist and actively cooperate with other departments, agencies and institutions); Nev. Rev. Stat. § 432B.210 (protective services must receive from state or any political subdivision or any agency any cooperation, assistance and information it requests). While some of these laws do provide for mutual cooperation, in general they appear intended to generate assistance to CPS agencies in fulfilling their statutory duties. For example, some of the statutes mention schools only in terms of their obligation to permit investigatory interviews by CPS workers or law enforcement agents to occur on school premises. Others simply direct other governmental agencies to assist CPS when requested to do so. This statutory orientation is, of course, entirely appropriate given that child abuse laws universally charge CPS or law enforcement agencies with the responsibility for investigating reported child abuse and taking appropriate action to protect abused children. While consistent with their statutory purpose, these provisions do not necessarily support school districts' own investigatory needs. Nonetheless, school districts certainly must comply with these directives to cooperate with investigations conducted by CPS and/or law enforcement agents and should attempt to develop beneficial working relationships which may lead to informal exchange of information on a case-by-case basis. Such dialogue can be extremely helpful but must always remain within the confines of the law.

Child Protection Teams

Another cooperative mechanism that increasingly appears in state child abuse statutes is the establishment of multi-disciplinary child protection teams. Over 30 states have provisions directing the creation of child protection teams; approximately half of these states make a representative from the education field either a mandatory or permissive member of the team. *See, e.g.,* Ala. Code § 26-16-50; Colo. Rev. Stat. § 19-3-303; Ill. Ann. Stat. ch. 23, § 2057.1; Ind. Code § 31-6-11-14; Mass. Gen. L. ch. 28A, § 6A; Minn. Stat. § 626.558; N.D. Cent. Code § 50-25.1-02; Utah Code Ann. § 62A-4-509; Va. Code § 63.1-248.6. School representatives may be included on child protection teams in other states as a matter of administrative policy or practice where team composition is left to the discretion of the social services agency. The functions assigned by statute to child protection teams vary from state to state, with the most prevalent role cited being to assist with or carry out the identification, diagnosis, evaluation and treatment of child abuse cases. Other frequently mentioned responsibilities include identification and coordination of services available to abused children and their families, case review or consultation, and development of community awareness and education programs. While some states limit child protection teams to advisory roles, most appear to structure them as active participants and service providers in abuse cases. A few states even specifically delegate investigatory duties to these teams. *See, e.g.*, Me. Rev. Stat. Ann. tit. 22, § 5005(2); Md. Ann. Code art. 88A, § 6(b)(2); Mo. Rev. Stat. §§ 210.145(a), 210.150; Nev. Rev. Stat. § 432B.350; Tenn. Code Ann. § 37-1-607; Utah Code Ann. § 62A-4-509.

Not only does a school representative's participation on a child protection team facilitate valuable exchange of information to assist in evaluating and treating specific instances of child abuse, the school may also use its par-ticipation on such a team as an opportunity to demonstrate its commitment to joint efforts and to foster understanding of the factors that affect a school's handling of abuse reports. By doing so, the school representative may begin to lay the ground work of trust necessary to establishing cooperative agreements that reflect the interests and obligations of all the concerned parties. A particularly difficult issue to resolve will involve how information will be shared during the investigatory stage of abuse cases. A joint publication issued by the Education Commission of the States and several other concerned organizations recommends that issues of confidentiality and interagency information sharing be addressed only after a strong base of understanding and shared commitment has been established. *Confidentiality and Collaboration: Information Sharing in Interagency Efforts*, 7 (1992).

CONFIDENTIALITY PROVISIONS

The scope of cooperative agreements will be affected by the legal restrictions placed upon information sharing by statutes, regulations, constitutional provisions and court decisions.[6]

Child Abuse Records

Both federal and state laws limit access to child welfare records to specified parties with a legitimate need for the information. The Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 *et seq.*, requires that states receiving federal funds under the Act provide by statute that "all records concerning reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal offense." 45 C.F.R. § 1340.14(i). In general, state laws provide access to these records to persons investigating abuse reports or to those providing services to abuse victims. Several states do include school officials or education agencies among those to whom access is granted. *See, e.g.,* Conn. Gen. Stat. § 17-47a; Ky. Rev. Stat. Ann. § 620.050 (4)(d); La. Rev. Stat. Ann. § 46.56(F); R.I. Gen. Laws § 42-72-8; Wash. Rev. Code § 26.44.070; Wyo. Stat. § 14-3-214. Other states could conceivably make information available to schools under other broader categories of persons to whom records may be released, such as those with legitimate need, agencies supervising child abuse victims, public officials in carrying out their official duties and mandatory reporters. Often states granting access to child abuse records limit the use of information obtained from the records or require that those with access to records promise to preserve their confidentiality. Other state statutes explicitly permit records to be released with consent of the parents and/or victims.[7] Consent exceptions may also be established by case law or administrative regulations.

While these confidentiality restrictions on child abuse records may appear to limit the bounds of interagency cooperation, avenues that permit useful information exchange without violating the underlying privacy considerations from which the confidentiality provisions derive should be explored. For example, ECS points out that a statute may clearly prevent release of a child abuse record but not specifically prohibit a caseworker from discussing certain details of the case which also may be recorded in the official file. ECS, *Confidentiality*, at 10. Of course, statutory silence should not necessarily be interpreted as license, and such dialogue should occur only after due consideration of the legal risks entailed. One report on interagency collaboration has suggested that some of the legal and ethical difficulties inherent in such informal informational exchange can be mitigated either by discussing with the student or parent the need for sharing of limited types of confidential information, thereby providing notice and an opportunity to consent or object or by requesting the individual to sign a formal written consent to release information. Soler, M., A. Shotton & J. Bell, *Glass Walls: Confidentiality Provisions and Interagency Collaboration* 19 (Youth Law Center, San Francisco, CA 1993).

Law enforcement personnel investigating or prosecuting a case of child abuse may also be subject to the confidentiality restrictions imposed by child welfare codes. This may be explicit or else result from requirements that those parties given access to child abuse records preserve the confidentiality of the information contained therein or restrict its use to certain specified purposes. Law enforcement entities may also be subject to public records disclosure exceptions which prohibit the release of criminal investigative reports or non-conviction data. *E.g.*, Wash. Rev. Code § 10.97.030. Again, there may be useful information which does not fall into one of these protected categories that law enforcement agents may be legally permitted to reveal.

Student Records

Schools engaged in interagency efforts in child abuse cases must adhere to the confidentiality requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g *et seq.*, which prohibits the release of student records without parental consent and gives parents the right to see their child's records.[8] Only directory information may be disclosed without consent. FERPA does not appear to be a major obstacle to interagency collaboration in school-based child abuse cases, but its requirement for parental consent should be strictly followed before releasing information from a student's record to another agency. Absent parental consent, an exception permits disclosure of information where a "health or safety emergency" exists. 20 U.S.C. § 1232g(b)(1)(I), 34 C.F.R. § 99.31(a)(10). According to a recent U.S. Department of Health and Human Services publication,

> It is the position of [the National Center on Child Abuse and Neglect] NCCAN and the Fair Information Practices Staff (the Federal unit that administers FERPA) that child abuse and neglect generally may be considered a "health or safety emergency" if the State definition of child abuse and neglect is limited to situations in which a child's health or safety is endangered. Furthermore, NCCAN and the Fair Information Practices Staff have agreed that responsibility for determining whether a "health or safety emergency" exists must be made by the school official involved, on a case-by-case basis.

Tower, C. *The Role of Educators in the Protection and Treatment of Child Abuse and Neglect*, 31 (DHHS Pub. No. (ACF) 92-30172, 1992).

Tower also cites another exception to the prior consent rule which permits release of information in school records to "State and local officials or authorities to whom such information is specifically required to be disclosed pursuant to State statute adopted prior to November 19, 1974 ." 20 U.S.C. § 1232g (b)(1)(E). Thus, this exception would apply in states that passed child abuse reporting laws prior to that date. *Role of Educators*, at 32. However, it appears limited to that information specifically required to be disclosed in the child abuse report and not to a child's record generally.

Schools must also ensure that they observe the confidentiality requirements imposed on student records by other laws, such as the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1412 (2)(D), 1417(c), 1480(2); 34 C.F.R. §§ 300.129, 300.560-.576, 303.460 and the Public Health Service Act, 42 U.S.C. §§ 290dd-3, 290ee-3; 42 C.F.R. Part 2 (drug and alcohol abuse records).[9]

Personnel Records

When entering into interagency cooperation agreements that apply to school-based child abuse cases, schools must also carefully consider what information about an accused employee it may lawfully communicate to other parties. Laws governing the disclosure of employee records may derive from several different sources, i.e., public records disclosure statutes, right to know statutes, state education codes, administrative policies and regulations, general case law and collective bargaining agreements. There may also be special provisions in a state's child welfare code. For example, in New York the commissioner of social services is entitled to receive from other governmental agencies such assistance and data as will enable the department and local child protective services divisions to fulfill their responsibilities properly. N.Y. Soc. Serv. Law § 425(1). Where these various laws do not speak clearly or appear to conflict, reconciling them may be difficult but is essential to promoting effective interagency cooperation without infringing on the interests of any party, including the accused.

Special attention must be paid to those provisions which protect certain material from public disclosure. For example, some states exempt from public access employee performance evaluations, individual salary information, preliminary or investigatory information, internal memoranda, opinion statements, disciplinary records, non-final recommendations, highly personal information, etc. Courts tend to interpret statutory exceptions to access very narrowly and place the burden on the custodian of the records to demonstrate that information withheld falls within one of the exempt categories and therefore is entitled to protection. *See, e.g., Brouillet v. Cowles Publishing Co.*, 114 Wash.2d 788, 791 P.2d 526 (Wash. 1990), 60 Educ. L. Rep. 638 (requiring release of records specifying reasons for teacher certificate revocations). Courts do not necessarily defer to agency regulations guaranteeing confidentiality of particular records, *id.* at 794, and may not uphold collective bargaining agreements that attempt to restrict access to public employee personnel files. *E.g., Mills v. Doyle*, 407 So.2d 348 (Fla. Dist. Ct. A pp. 1981); *Board of Education v. Areman*, 41 N.Y.2d 527, 394 N.Y.S.2d 143, 362 N.E.2d 943 (1977). Case law concerning confidentiality restrictions generally arise out of attempts by government entities to withhold certain information from the general public or the media. Therefore, the law must be carefully scrutinized to determine whether material exempt from general public disclosure may nevertheless be exchanged by government agencies in pursuit of their official functions.

OVERCOMING POTENTIAL CONFLICTS OF INTEREST IN INTERAGENCY COOPERATION

Several points of conflict which have proven troublesome to those concerned about school-based child abuse are discussed below with suggestions on how schools might wish to respond.

Reporting

The first contact between schools and other agencies in school-based abuse cases will usually occur when a statutorily required report of suspected abuse is made. In all fifty states, school personnel are required to report suspected child abuse to either CPS or law enforcement agencies. However, not all states clearly require the reporting of alleged abuse by a school employee. Federal law directs states to include in their definitions of reportable abuse, maltreatment allegedly committed by any "person who is responsible for the child's welfare," 42 U.S.C. § 5106g(5), but contains no specific reference to educational employees. The regulations do mandate inclusion of persons providing "out of home care" but again do not specifically list school personnel as part of this group. 45 C.F.R. § 1340.2 (d)(4). Some state statutes have opted to require explicitly the reporting of abuse committed by school employees. *See, e.g.*, Calif. Penal Code § 11165.5; Conn. Gen. Stat. § 17-38a(b); Fla. Stat. Ann. § 415.503(11). Other state laws require reporting of abuse by school employees under definitions which do not distinguish among perpetrators. *See, e.g.*, La. Rev. Stat. Ann. § 14:403(B)(1), (2); Wash. Rev. Code Ann. § 26.44.020(12); Wis. Stat. Ann. § 48.981(1)(a). Other definitions would apparently require reporting of sexual abuse by a school employee but are less clear with regard to other forms of abuse. *See, e.g.*, Ala. Code § 26-16-2(a)(2); Mich. Comp. Laws Ann. § 722.622(c), (e). Many states, consistent with federal requirements, mandate reporting of suspected abuse committed by perpetrators designated by such terms as "person responsible for [child's] welfare," "person who has permanent or temporary care or custody or responsibility for supervision of the child," "custodian," and "person having custody or control." These terms make agency jurisdiction and reporting obligations ambiguous with respect to abuse committed by a school employee. Such vague terms may be more clearly defined in administrative regulations adopted by social service agencies to encompass school-based abuse. If so, these regulations and their legal basis should be clearly communicated to state and local school officials. Increasing the understanding of school officials as to the scope of their reporting obligations will help to reduce uncertainty that may lead to non-reporting—which may be misread as lack of cooperation or intentional concealment. School officials must equally be aware of court decisions which may provide more definitive guidance. It is especially important where no other legal guidelines exist as to reporting responsibilities in school based abuse cases, that schools either establish their own formal procedures indicating the circumstances under which either CPS or law enforcement agents should be contacted or else seek clarification of the issue in an interagency agreement.

Investigations

One of the more controversial areas in interagency efforts concerns the role of school personnel in the investigation of alleged child abuse by a school employee. As noted above, some states have statutes mandating that schools cooperate with investigations being conducted by CPS workers or law enforcement agents by providing access to complainants and witnesses for interviews on school grounds or providing information not otherwise protected from disclosure. School districts subject to such statutory requirements or those who choose to cooperate as a matter of policy should interpret cooperation to mean neither unquestioning deferral to the wishes and demands of these outside agencies nor as an invitation to rely on them to satisfy the obligations of the school district to investigate.

Once a school district receives a complaint or information that a school employee has abused a student, the district must move beyond passive cooperation and take affirmative steps separate from CPS or law enforcement activities. Taking independent action may in many instances be most effective if the district coordinates and consults with CPS and law enforcement personnel. Communication and collaboration, whether on a case-by-case basis or under the terms of an interagency memorandum of agreement, can do much to alleviate some of the concerns raised by child welfare advocates over school investigation in child abuse cases.

- **Authority to Investigate**

Some have suggested that school officials have no authority to investigate allegations of child abuse committed by school employees. It is true that every state charges CPS or law enforcement agencies with the duty of validating reports of suspected child abuse, but it is not clear in every state that such jurisdiction is intended to be exclusive. Few would dispute that schools should exercise reasonable care to protect the health and safety of their students. In absence of any specific prohibition, a school should undertake a separate investigation of alleged abuse committed by a school employee, especially where there exists no agreement for information sharing between the district and CPS or law enforcement. Lacking such an agreement, a district should not assume that either CPS or law enforcement agents will want to or legally be permitted to release their investigative data to school districts. *See, e.g.*, Biggs, J. and Rice, K. *School Administrators Guide to Investigations*, 4 n. 10 (Wash. Educ. Resources, Inc. 1992)(noting cases of abuse by certificated staff in several Washington counties in which CPS and law enforcement were notified but provided no follow up information to school districts). Under such circumstances, a school district must develop its own information to support discharge of an employee who actually has abused a student. Furthermore, a school district which fails to adequately investigate charges of alleged child abuse by a school employee subjects itself to potential liability, or at least the cost of defending law suits, under both state and federal law. *See, e.g., Doe v. Taylor Independent School District,* 975 F.2d 137 (5th Cir. 1992); *Stoneking v.*

Bradford Area School District, 882 F.2d 730 (2d Cir. 1989) (section 1983 cases based on school officials' failure to investigate adequately reported incidents of sexual molestation of students by school employees); *Bratton v. Calkins and Deer Park School Dist.*, No. 87-2-00007-3 (Spokane Cnty., Wash. Super. Ct. July 1991)(cited in Biggs, J. *Administrators Guide*, at 11 as case of "negligent investigation" resulting in verdict for plaintiff of several hundred thousand dollars). *See also* Gregory G. "Child Abuse in Schools: Responsibility Under Federal Law?", at pages [ ].

- **Unqualified Child Interviewers**

Opponents of school district investigations inevitably cite the lack of qualifications of school administrators to properly interview children and to gather and assimilate information in child abuse cases. This objection does have some foundation, particularly in cases of sexual abuse, because critical testimony by the abused child may be excluded from subsequent adjudicatory hearings if the initial interviewer unduly influenced or "contaminated" the child's account of events by asking leading or suggestive questions. Other internal factors may recommend against a school administrator conducting the investigation in a case of sexual abuse of a student by a staff member. Biggs mentions several important considerations: 1)an investigating administrator may be placed in a no win situation because of disagreements among staff as to whether the abuse occurred; 2)an investigation by a school administrator may be perceived as a cover up or at least be considered suspect; 3)an administrator may be criticized for inadequate investigation if she misses, misinterprets or fails to pursue a lead that a trained investigator would have handled differently. *Administrators Guide*, at 11.

In order to overcome these problems, Biggs recommends, and this author concurs, that school districts consider implementing a two-tier investigation process similar to the one established in the State of Iowa. *See Model Policy and Rules on Procedures for Investigating Allegations of Abuse of Students by School Employees* (Iowa Dept. of Educ. Nov. 1989) (text without comments reproduced in Appendix [ ] at pages [ ]). Under the Iowa system, a **trained** school employee or administrator conducts a prompt first-tier investigation which results in a tentative conclusion as to whether the allegation is well founded and whether referral to law enforcement or a second level investigator is necessary. The system contemplates full investigation and resolution of most complaints of physical abuse at the first tier level; however, serious cases of physical abuse and likely incidents of sexual abuse are referred to law enforcement if the conduct, if true, would constitute a crime or to a second tier investigator if the improper conduct would not be considered criminal but is sufficient grounds for discipline or termination. The second tier investigator should be an independent professional investigator, preferably experienced in handling abuse cases and with no personal or professional bias to predetermine outcome.

Because of the sensitive and crucial nature of the victim's testimony in a sexual abuse case, Biggs recommends that schools contact CPS or law enforcement to conduct the initial interview, especially where the child is very young. Avoiding in-depth questioning of the child before a CPS or law enforcement interview would not appear to jeopardize the school's interest in gathering its own facts and would reduce the possibility of "contaminating" the child's testimony. However, school districts should seek either through an established agreement or case-by-case requests to have a school representative present at the interview conducted by CPS or law enforcement. The school person present should be someone with whom the child is familiar to help put the child at ease. *See Role of Educators*, at 26; *accord*, Hungerford, N. "Investigating and Screening Sexual Misconduct Charges and Coordination with Other Agencies," *School Law in Review—1991*, at 8-6 (NSBA 1991) (reprinted at pages [ ]). Whether the school representative will actively participate in the interview should be determined by mutual agreement before the interview takes place. Some states grant CPS the authority to determine the presence and participation of a school representative at such interviews, *e.g.*, Wash. Rev. Code § 26.44.030(9), while other states specifically allow the presence of a school person, *e.g.*, Wyo. Stat. § 14-3-214.

The presence of a school employee at the CPS or law enforcement interview may also help to reduce the need for repeated questioning of the child which can re-traumatize the child. Other means, such as note taking, and audio or video recording, to "capture" the child's initial statement may be considered as long they do not interfere with the interview process or intimidate the child. The possible release of these recordings to the accused employee's attorney and their admissibility in future legal proceedings should also be factors in determining whether such techniques should be used.

- **Advance Notice to the Accused**

Child welfare advocates have also voiced concerns about school district practices regarding the timing and specificity of notice to an accused employee that charges of abuse have been made. Although no one disputes that the accused has a right to know about such serious allegations, some feel that notice without immediate questioning allows a guilty employee time to concoct an "alibi" or cover story. However, a school may not be able to delay notification to an employee of charges made against him or her if a collective bargaining agreement or other contract term provides for immediate notice. Under such circumstances, the Iowa Model Policy provides that the contract terms shall control. The Iowa procedures, however, also comment that "[g]enerally recognized investigative technique provides that little or no notice is given to an accused person prior to being interviewed. This is to the benefit of the innocent as well as to the detriment of the guilty." *Iowa Model Policy* § 102.8 Comment. Consistent with this view, the policy directs that in cases of alleged physical abuse, the level one investigator will question the employee at the time the accused receives a copy of the complaint. When a sex crime has been alleged, the level one investigator makes the preliminary determination of whether the allegations are founded based solely on the interview with the student. Where collective bargaining agreements require immediate notice, the investigator can either interview the employee at the time the accused is provided a copy of the complaint or else coordinate with law enforcement authorities who will conduct a separate interview right after the employee receives notice. The policy specifically notes that even a lapse of a few hours between notice and an investigative interview is not good practice.

These procedures are not without risks. Some school attorneys have cautioned that when an employee is first notified of the charges made against him and the district's decision to suspend him pending an investigation, the employee should not be asked to respond to any specific questions. "Investigating and Screening," at 8-7, *infra*, at [ ]. Hungerford's concerns are based on the following:

> Often the employee will not have representation at this initial meeting, which is usually scheduled quickly in order to suspend the employee and separate that employee from students during the investigation. Administration pressure to get the employee "to talk" during this meeting may backfire, resulting in an accusation that the employee was deprived of her right to representation. The sympathy of fellow employees for the accused may be aroused by a belief that the district took advantage of the staff member under investigation.

Id.

To avoid these problems, deferring an interview with an employee until after a law enforcement agent has questioned the accused seems well-advised. In this manner, the employee will be interviewed by a skilled professional initially and will be able to contact an attorney or union representative for any future interviews by the school district. Of course, this practice will work most effectively where there is clear communication between the two agencies and the maximum exchange of information permitted by law.

Case Disposition

Because the agencies are charged with different responsibilities, the efforts of school districts, law enforcement and CPS may not coincide at the disposition stage. Cooperative agreements functioning during the investigatory phase may be helpful in averting some of the potential conflicts by creating a coordinated investigation which provides all parties with the information necessary to accomplish their purposes. However, other issues may still arise despite cooperative efforts.

In order to discipline abusive teachers effectively, school districts must sometimes act even where the misconduct does not rise to the level of criminal activity but nonetheless constitutes behavior warranting discipline or discharge for "immoral" conduct or neglect of duty. School districts likewise must have their own investigatory information when criminal sex abuse is involved. As Hungerford points out the law enforcement agency may for its own reasons drop the complaint without resolution or may engage in plea bargaining to a lesser charge. Even if the matter is brought to trial, it may not result in a conviction on criminal sex abuse charges. Where there is no clear cut determination of guilt through the criminal justice system or even where the staff member is acquitted, there still may be sufficient evidence to justify a district's seeking discharge. School district hearings, unlike criminal proceedings, are not subject to a "beyond a reasonable doubt" standard. "Investigating and Screening," at 8-3, *infra*, at page [ ].

Timing of adjudicatory hearings may also have to be coordinated. Hungerford notes that the school district may be ready to conduct a disciplinary or discharge hearing before the information gathered by law enforcement even goes to a grand jury for indictment. Whether to postpone the district's action until the criminal process is completed depends on a number of factors. In some jurisdictions, a school district may be compelled by statute or contract to either begin dismissal proceedings or reinstate a suspended teacher within a specified time frame. If the school district deems a delay desirable, it will have to seek agreement from the accused's counsel to waive the statutory or contract deadline. Before making such a decision, the district must carefully weigh several factors.

> [It] depend[s] on whether the staff member will be on paid or unpaid status in the meantime, the likely days or months of delay, and the impact that conviction or exoneration would have on the district's own course of action. If, for instance, the district's own investigation convinces its superintendent that dismissal is called for because of neglect of duty, regardless of whether a criminal conviction occurs, then there would seem to be little reason for the district to delay its action.

Id. at 8-4, *infra*, at page [ ]. Hungerford also notes that a school district may decide to delay its termination proceedings if a criminal trial is scheduled which involves the same set of facts, making it likely that the employee will be advised by his attorney not to respond to certain questions by district officials which might prejudice his Fifth Amendment rights not to incriminate himself. Testimony given by an accused employee under oath at a termination hearing could be used to impeach later testimony given in a criminal trial or introduced as admissions if the employee refused to take the stand. While the district could proceed using evidence other than testimony from the accused, it could not argue that the employee's failure to respond to questions indicates "guilt." *Id.*

Where there are pending criminal proceedings, the district may also wish to coordinate the timing of its hearing with the prosecutor. The prosecutor may attempt to persuade the school district to postpone its hearing in order to avoid giving the employee's attorney an opportunity for discovery and intimidation or discrediting of key witnesses prior to the criminal trial. The school district must keep in mind that if it agrees to the delay, it will bear the additional cost of paying the teacher while the criminal justice process runs its course. In addition, as noted above, there is no assurance that a conviction will result. Acquittal of an employee in a criminal trial does not preclude termination of the accused but does introduce a strong element of ambiguity into the hearing despite the difference in the standards of proof. *See* Pedersen, D. and Hartog-Rapp, F. "Discipline of Teachers for Reasons of Immorality," *Preventing and Defending Actions by School District Employ-*

ees, B173-74 (NSBA Council of School Attorneys Semnar, Aug. 1986). Conveying these general concerns to one another may help facilitate agreement on a case-by-case basis wherein each party assesses the strength and likely outcome of its case and determines the importance of the timing of its proceedings in relation to the other party. Development of a working relationship may not always produce agreement but can achieve workable compromises where lack of communication may create otherwise avoidable problems.

SCHOOL DISTRICT'S RELATIONSHIP WITH PARENTS

In cases of school based abuse, schools can do much to facilitate investigation, allay fears and suspicions and avoid potential liability by clearly communicating with the parents and child about the status and process of the case. Pedersen and Hartog-Rapp suggest that the parents and the child should be advised of the seriousness of the charge, assured of the district's support if the allegations are shown to be true, informed that the accused employee does have certain rights guaranteed by law which the school must respect and asked to report any additional contact from the employee or unusual occurrences. If the parents have not already contacted a social service or law enforcement agency and a report appears indicated, the school district should inform the parents that the matter will be reported to the appropriate agency which will also be conducting a separate investigation. Parents should be advised of the distinct responsibilities of each agency and the reasons for keeping some investigative matters separate. They should be told that their cooperation with each investigation is appropriate. "Discipline of Teachers," at B168, B175-76.

As the school district's investigation progresses, parents should be given appropriate information about the status of the case to assure them that the district is acting as quickly and vigorously as possible to reach a prompt resolution. Their confidence in the school district's response to the situation is crucial to maintaining their cooperation and to avoiding later charges of a cover-up or inadequate investigation.

CONCLUSION

Interagency cooperation can assist a school district in responding effectively to allegations of abuse by school employees. Whether through formal statutorily created mechanisms or through development of working relationships based on mutual trust and understanding, schools can meet their own obligations without interfering with the efforts of other governmental agencies to combat child abuse.

END NOTES

1. NSBA has promoted legislation now pending before Congress which encourages interagency cooperation to respond to the needs of the whole child in order to enable and enhance learning experiences in schools. Link Up for Learning Act, H.R. 520, S 48.

2. This article does not deal with interagency communications related to screening prospective employees for past criminal or abuse history. *See* Howard, S. "Protecting Children By Careful Selection of Employees," at pages [ ]; Mann, J. "Negligent Hiring and Retention or Unfit Employees: Scope of a School District's Liability," *School Law in Review—1991*, at 7-1 (NSBA 1991); Howard, S. "Employment Reference Checks and Liability Issues," *Inquiry and Analysis*, September 1990, at 1. Therefore, it does not cover the confidentiality issues, security needs and inherent limitations of aggregate information systems available through electronic means. *See Confidentiality and Collaboration: Information Sharing in Interagency Efforts* 21-26 (Education Commission of the States, 1992); *Central Registries for Child Abuse and Neglect: A National Review of Records Management, Due Process and Data Utilization* (National Center for State Courts, May 1988). It also does not discuss the communication that should take place between local school districts and state boards of education or other state licensing authorities when it is determined that a school employee has engaged in child abuse. Some states require law enforcement authorities to notify the board that issues teaching certificates of convictions or arrests of teachers for child abuse. *See, e.g.*, Ariz. Rev. Stat. Ann. § 15-510(B); Cal. Penal Code §§ 291, 291.5; Conn Gen. Stat. § 17-38a(f)(4). Iowa by administrative regulation requires the level one investigator to file a complaint with the State Board of Educational Examiners in cases of founded or admitted abuse. Filing a complaint is discretionary where the accused employee voluntarily resigns without admitting the truth of the allegations. Iowa Model Policy § 102.11. Relaying such information to the licensing entity with power to revoke teaching certificates would appear to be an effective means of preventing an abusive employee who has been discharged from simply seeking employment in another location.

3. *See* Hungerford, N. "Investigating and Screening Charges of Sexual Misconduct and Coordination with Other Agencies," *School Law in Review—1991* (NSBA, 1991), reprinted herein at pages [ ]; Frels, K. and Bump, R. *Investigating Alleged Wrongdoing by Employees in the School Setting* (NSBA 1990); Biggs, J. and Rice, K. *School Administrators Guide to Investigations* (Wash. Educ. Resource Inc. 1992).

4. *See* Gregory, G. "Child Abuse in Schools: Responsibility Under Federal Law," at pages [ ].

5. The information on state child abuse statutes reflected in this article is based on materials presented in U.S. Dep't of Health and Human Services, *State Statutes Related to Child Abuse and Neglect 1988* (1989). That publication contains legislative provisions signed into law before December 31, 1988. Consequently, there may have been subsequent changes in state law which are not considered or discussed in this article.

6. These same restrictions are also relevant in determining what information about a child abuse case may be released by the school to the media, parents and community.

7. According to a report by the Youth Law Center, consent is the most common formal mechanism by which governmental entities exchange information. The report recommends that releases of personal information be in writing and contain at least the following information in order to provide informed consent: (1)name of person who is subject of information; (2) name of person(s), program(s) and agency(ies) sharing the information; (3)name(s) of the recipient(s) of the information; (4) reason for sharing the information; (5)kind and amount of information that will be shared;

(6) subject's signature; (7)date release is signed; (8)statement that the release can be revoked at any time; (9)expiration date or event that will terminate the release; and (10) statement that subject has a right to a copy of the release. Soler, M., A. Shotton and J. Bell, *Glass Walls: Confidentiality Provisions and Interagency Collaborations* 23, 30 (Youth Law Center, 1993). See Appendix [ ] for sample consent/release forms.

8. *See* Uhler, S. "Family Educational Rights and Privacy Act," *Inquiry and Analysis*, May 1989, at 1.

9. *See* Rubin, D. "Federal Confidentiality Requirements for School Drug Counseling Programs," *Inquiry and Analysis*, May 1991, at 1.

INVESTIGATING AND SCREENING SEXUAL MISCONDUCT CHARGES & COORDINATION WITH OTHER AGENCIES

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INTRODUCTION

Few situations are as traumatic as a charge of sexual misconduct by a school district staff member. School administrators are likely to react with shock, sometimes disbelief, especially if the accused teacher or classified employee has a long, satisfactory employment history with the district, or if the administrator has ignored prior indications of a problem of the same sort. Principals and other administrators responsible for the decision to hire the accused staff member may feel a need to defend that employee out of fear that their judgment or thoroughness will be questioned. Parents of the student or students making the accusations will be distraught, will feel betrayed by the school system, and will demand immediate action. Fellow staff members will frequently feel caught between loyalty for the accused employee and their responsibility for the welfare of students.

Further, school officials recognize that such serious and inflammatory charges are likely to receive wide publicity, especially if the staff member is indicted and tried on criminal charges of sexual abuse or assault. The district may very well be caught between legal requirements to preserve the confidentiality of staff and student records and the press' desire to know how the matter is being handled.

Finally, school officials know that not all charges of sexual misconduct made by students are true, or verifiable. Staff members who are unjustly accused will most likely continue to work for the district, and their reputations and effectiveness as employees are in jeopardy.

This article is intended as a practical guide for school attorneys and school administrators, outlining steps to take when accusations of sexual misconduct are raised. The recommendations made are the product of ten years of experience in assisting Oregon school districts to respond to charges of the sexual misconduct of staff members. The advice given, especially that relating to cooperation with other agencies, is necessarily the result of the author's experiences in dealing with law enforcement, child protection, and teacher licensing authorities in Oregon. However, the procedures recommended will benefit school districts anywhere in the nation.

Most of the article focuses on charges that involve sexual contact of a staff member with students or other minors, on or off campus. Unfortunately, complaints about employee sexual misconduct seem to be increasing and varied, including:

- Reports by seniors and recent graduates of one rural high school that a long-time teacher and wrestling coach had offered them employment as prostitutes in a nearby city and had also touched their genitals in the locker room and on a bus trip.
- A complaint by a junior high aged girl that her male teacher had on several occasions sat at a table with her and used his foot and leg to "feel" up and down her leg.
- Reports that a high school teacher had engaged in sexual relations with female students, largely initiated by the girls themselves, over a five-year period.

- Charges that a high school teacher took a female student for a ride off campus to his apartment, where he attempted to force her to have sex with him.
- Reports of teachers discussing sex acts in explicit detail in classes where sex education was not part of the curriculum.

SOURCES OF INFORMATION OF SEXUAL MISCONDUCT

How a school district reacts will depend, to a certain degree, on how the initial information about possible sexual misconduct comes to the district's attention.

Student or Parental Complaints to Other Staff

Sometimes a student or students will seek out a counselor, principal, or trusted teacher to convey a complaint of improper touching or improper language by the accused staff member. Possibly the information will be relayed to the counselor or principal by uninvolved students, who have heard the account of a student claiming such improper activities. And sometimes uninvolved staff members "pick up" the information inadvertently, by overhearing discussions among students or inquiring why a student is upset.

Staff should be aware that district policy requires a report to administration of any information concerning threat or potential threat to the welfare of students — of whatever type. Such policies relieve staff of the burden of deciding whether to report charges against a colleague — charges that they know are potentially very serious and career threatening. The district policy should provide an alternative avenue for making a report (such as to the superintendent or personnel director) if the building administrator is the party accused. *See* Trickey, H & R. Fossey, "School Employees' Legal Obligation to Report Suspected Child Abuse, " at pages [ ].

Non-administrative staff members should be told that they are not authorized or responsible for conducting an investigation into such charges, even though they will be expected to cooperate in the district's investigation by providing the information they have received.

Counselors, need clarification of their role in situations where they have gained information about possible sexual misconduct of staff in a confidential conversation with a student — especially if the student begs the counselor "not to tell." In Oregon, as in many states, all school staff members have a statutory obligation to report to authorities when they have reason to believe child abuse has occurred or is occurring. ORS 418.740-.775. The counselor should explain this obligation to the student: "I am required by law to report what you are telling me because it is a very serious matter." Counselors should receive inservice training in dealing with these conflicts between their desire for a confidential relationship with a troubled student and their duty to report certain confidences. In their work with students, counselors simply cannot promise that they will "never tell" certain secrets shared with them.

Likewise, counselors need to know that while they may normally function independently of administration in resolving parental concerns about teachers or other staff, when a parent or child raises accusations of sexual or other misconduct of that staff member, the matter should immediately be turned over to administrators for investigation and action.

Regardless of how it reached the attention of administration, information from parents or students of possible sexual misconduct must be handled in compliance with any "complaint procedure" set forth in policy or the district's collective bargaining agreement. Oregon collective bargaining agreements frequently contain pro-cedural requirements, including a deadline of 5 or 10 days for the administrator to bring any complaint to the attention of the teacher involved. Often the agreement specifies that the employee must be provided with "the full nature of the complaint," including, typically, the name of the complainant(s). Failure to follow these procedural requirements to the letter may result in a later grievance that could foreclose the district's use of the information in any disciplinary action or job action.

Reports from Other Staff

Similar policies and procedures should be followed when staff members report information that constitutes an accusation of sexual misconduct by a fellow employee. These, too, are "complaints" that must be handled according to the procedures of the collective bargaining agreement or district policy.

Staff members who have seen a colleague improperly touch a student may be indignant and outraged at the poor judgment and misconduct that besmirches the reputation of the entire profession. Such was the case in a small elementary school where a 7th-grade male teacher in his 50's had received prior discipline for hugging female students, allowing them to sit on his lap, putting his arm around their waists, and other overly familiar gestures. He was specifically directed that he was not to engage in such touching, even if it was initiated by the students, some of whom seemed to enjoy this contact. His fellow teachers reported to the principal when he once again was seen with a female student sitting next to him, in class, with her head on his chest for at least 20 seconds, and when he was observed walking down the hall with his arm around the waist of one of his female students. These teachers were angry at their colleague — and had no problem with being identified as the source of the most recent observations.

More often, fellow staff members will report to the principal evidence of sexual misconduct, but will ask that their names not be given out as sources of the information. The principal needs to clearly convey the legal obligation of these staff members to report such information to the appropriate authorities under state child abuse law. Further, these staff members need to know that they will be expected to cooperate in the resulting investigation, whether by law enforcement or school officials.

The principal may try to protect the fellow employee from being identified as "the informant" by observing the misconduct first-hand. But rarely is this possible. While principals want to cultivate the kind of relationships with staff that make them trusted advisers, ultimately if an uninvolved employee comes forward with information, that employee will have to be named as the source of charges. The principal's long-term relationship with all staff is best served if the principal does not make any promises of anonyminity or "protection" for the source.

Reports from Outside Agencies

Sometimes the district's administrators become aware of charges of sexual misconduct when contacted by the policy or child protective services. A parent or student or other person with information may have gone directly to these outside agencies without having shared any information with any school official first.

The school district will obviously have a duty to cooperate in the agency's investigation of any charge relating to improper contact between a staff member and a student. The district will also have to decide whether to conduct its own, concurrent but separate, investigation of the charges.

School districts should consider conducting their own investigation for several reasons. Often the law enforcement agency may drop the complaint without resolution, or may engage in plea bargaining to a lesser or misdemeanor charge — or may bring the matter to trial and fail to obtain a conviction on criminal sex abuse or assault or battery charges. If the district is relying on the criminal justice system to resolve the question of whether the staff member has neglected his/her duty or engaged in "immoral" conduct, the district may be left "high and dry" if the criminal process does not result in a clear-cut determination of guilt.

Even when the staff member is acquitted of criminal charges, under the standard for conviction of "beyond a reasonable doubt," sufficient evidence may support the charges of the complainant(s) to justify some kind of disciplinary action or discharge. The school district is not bound by the decision of a judge or jury in a criminal trial, because it is not obligated to use the same "beyond a reasonable doubt" standard before taking job action.

Thus, it is recommended that school officials conduct their own investigation, using any information already gathered by police officers or other agency officials. For example, the district administrator in charge of the investigation should obtain any police investigatory records and interview the police officers who first contacted the complainants and the accused staff member.

Because of the backlog in the criminal justice system, the school district may complete its investigation and be ready to take disciplinary or dismissal action before the information gathered by police goes to a grand jury for an indictment, or before the case goes to trial. In some cases, the school district may wish to agree with legal counsel for the accused that district job action be delayed until after other, outside events, such as a trial occur.

The district and its attorney will have to decide whether such delay is desirable — depending on whether the staff member will be on paid or unpaid status in the meantime, the likely days or months of delay, and the impact that conviction or exoneration would have on the district's course of action. If, for instance, the district's own investigation convinces its superintendent that dismissal is called for because of neglect of duty, regardless of whether a criminal conviction occurs, then there would seem to be little reason for the district to delay its action.

There is one additional complication that oftentimes convinces a school district to delay pre-termination procedures: if a criminal trial is scheduled, and the same set of facts are at issue in both arenas, the staff member will probably be advised by his attorney not to respond to some questions by district officials because of possible prejudice to his Fifth Amendment right not testify against himself. While the Fifth Amendment does not apply to civil or employment-related investigations and hearings, answers given by the accused employee in those arenas, especially if given under oath and with a tape recorder running, could be used to impeach testimony the employee gives later in the courtroom, or be introduced as admissions even if the employee does not take the witness stand in the criminal trial.

The district can, of course, proceed with its disciplinary or dismissal action based on information from complainants, even if the staff member refuses to respond to questions about those same incidents. But when the reason for the lack of response is the employee's attorney's advice not to answer, because of an impending criminal trial, the district cannot assert that the lack of response has any negative meaning or any suggestion of "guilt" by the employee of the charges.

WHO SHOULD CONDUCT THE INVESTIGATION?

Building administrators or other immediate supervisors should be trained to investigate a variety of complaints or reports of possible rules violations by employees. But allegations of sexual misconduct involving students are much more serious matters that threaten to result in possible criminal charges as well as job action. These situations call for the involvement of a district-level administrator: perhaps the personnel director, an assistant superintendent, or, in a small district, maybe necessarily the superintendent, who has specialized training in investigating allegations of child abuse.

In situations where no school district administrator has had training or experience in conducting an investigation, an outside investigator or the district's attorney should be called in to direct the gathering of information.

As suggested above, the district should not rely upon law enforcement officers to conduct the district's investigation. Police or officials of child protective agencies are seeking to learn whether a criminal statute or other state law has been violated. The employing district is trying to determine whether the employee has violated district policy, neglected job duties, or used poor judgement in his or her relationships with students.

While some or most of the pertinent facts may be the same for both investigations, the objective and purpose of the investigations are obviously different. Different questions may need to be asked. For instance, the district may, in some situations, need to know whether the employee was aware of or informed of policy or had received certain oral directives from supervisors. Knowledge of the regarding sexual abuse of minors is assumed, and need not be established in most criminal matters.

WHAT IS THE EMPLOYEE'S JOB STATUS DURING THE INVESTIGATION?

Once district officials have received a complaint or information suggesting that a school employee has engaged in sexual misconduct with students, district administrators should consider whether that employee should remain on the job during the investigation. In most cases, the answer is no.

Paid suspension from normal work duties has several advantages: It removes the employee from further contact with students; it may make it more likely that students and fellow staff questioned during the investigation feel free to give full and honest responses; it will soften any public criticism that the district "did nothing" while a "known" threat to students continued to teach or perform other duties in their midst. Finally, because the employee suffers no loss of pay or benefits during the investigation period, it protects the accused employee from financial loss.

There are also disadvantages of removing the employee, even for a short time, and even through a paid suspension. The absence of an employee from work may trigger questions and rumors. Some parents who know of the charges assume that the temporary removal means the employee is guilty as charged. Even if fully exonerated, the employee may have difficulty re-establishing credibility with parents and students.

Despite these problems the benefits of temporarily removing the employee from the regular work site (either through paid suspension or reassignment to an alternative, closely supervised work site with no student interaction) usually outweigh the disadvantages when the charges are as serious as sexual misconduct.

In some cases, state statute or collective bargaining agreement provisions will limit the district's options. In Oregon, for instance, even permanent teachers (those in their fourth year or more for the same district) may be suspended with pay if the superintendent has reason to believe that cause for dismissal exists and believes suspension is in the "best interest of education in the district," but the period of paid suspension may not be more than five work days; at the end of that time the district must reinstate or begin dismissal proceedings. ORS 342.875. In such cases, legal counsel for the accused may agree to extensions of this period when the district has not completed its investigation during that time.

Paid, rather than unpaid suspension should be used during a period of investigation because unpaid suspension implies disciplinary action; may trigger "just cause" rights under a collective bargaining agreement; and probably implicates due process right sunder the Fourteenth Amendment for deprivation of a "property" interest. *See Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

Consistent with the ability to do a thorough investigation of charges, the district should keep the period of paid suspension as short as possible. In one case involving a permanent elementary teacher in a small rural school, the teacher's counsel agreed-to paid suspension while the district awaited the results of a police investigation and grand jury review of evidence. More than 30 days later, the grand jury failed to return an indictment, and the district was forced to conduct its own investigation to determine if the teacher had engaged in inappropriate sexual touching of students, as charged.

After interviewing the involved students thoroughly, district officials were satisfied that the charges were false, but by this time every family in the district was aware of the teacher's absence from school and the fact that he was under investigation. The district decided he could not be returned to the classroom for the remainder of the school year, and was forced to create an alternative assignment for him for the next two months. Some of the damage to the teacher's reputation — and the district's — could have been avoided had the investigation been conducted more promptly.

SOME KEYS TO A THOROUGH INVESTIGATION

Conducting a credible investigation requires organization and thoroughness. When a staff member is accused of sexual misconduct involving students, interviewing students will be necessary. Extreme care must be used to avoid "tainting" the statements made by children.

- Begin with a detailed interview with the person or persons who made the original complaint. If the complainant has no first-hand information (as in the case of a parent relaying information supplied by a child), find out when the child first mentioned the staff member's alleged actions, what was going on in the home at the time, and whether the child had apparently discussed the matter with other students before coming to the parent. In one case, a fourth-grade girl told her mother that she was "uncomfortable" going to school because she had seen her teacher touch some of the boys in class in the "crotch." Only later did the school officials learn that these "revelations" were made over the phone when the girl's mother angrily chastised her for having failed to get on the bus again that day, after the mother had left for work. The student, who had been learning about "good touching — bad touching" in school the previous week, concocted a story of improper touching as a way to escape her mother's wrath over her missing school again that day. More thorough questioning about the circumstances of the student's first complaints to the parent might have made school officials consider, early in the investigation, whether the student's report could be false.
- Arrange to interview the student who made the accusations in a private setting, away from school, if necessary, and not in the presence of the parent. When school officials explain that the presence of the parent may make the child's information less credible in some later hearing, parents generally cooperate in allowing the private interview of even very young students. A school counselor or principal should be present, if possible, so that the child is not placed in a room of total strangers for the interview.
- Prepare carefully for the interview by drafting a sequence of open-ended and non-leading questions. The written script for the interview is valuable evidence, later, that the student was not "prompted" to give certain answers. A tape recording of the entire interview can likewise substantiate that appropriate questioning techniques were used.
- Recognize that whatever the means of recording the interview — whether a tape recording, videotape, interviewer's notes, or a verbatim transcript by a trained recorder — the results may need to be made available to the employee's counsel, upon request, at some stage during or after the investigation.
- Ask students broad and general questions like, "Has anything happened to you at school recently that has caused you to be upset?" rather than opening with specific and pointed questions like, "Has Mrs. _______ touched you in a way that made you feel uncomfortable?" But be prepared to move to more specific questions if the student volunteers no names or details. Do not provide any details or suggest a "right" response to any questions, however.
- Ask all persons interviewed to draw a diagram showing "who was where" during any critical time segments. Ask for a detailed sentence of what happened first, second, etc.; what was said, as precisely as possible; who was present; how long various episodes lasted. It is frequently very effective to ask students to "play act" what happened, if the student can comply in a way that is not embarrassing. Sixth-grade girls who had accused a male teacher of "snapping the bra strap" of a fellow student were asked, during their individual interviews, to demonstrate what they had seen by role playing the part of the teacher, with their female assistant principal playing the

part of the female student. Their hesitant and varied role playing, plus different accounts of who was present, ultimately convinced school officials that the complaints were not valid.

In another situation, a female student, recently graduated from high school, accused her coach of having taken her to the home of another teacher where he offered her marijuana and pushed her down onto the bed in an adjacent bedroom, and asked to have sex with her. The owner of the home said the girl had never been inside of his house on any other occasion. The coach denied the girl's account. But the girl was able to draw an accurate floor plan of the house and describe in great detail the furnishings and arrangement of furniture and rooms. She had had no advance notice of this request, nor any other way to anticipate the interviewer's questions about odd but notable details. Her unhesitating responses convinced the district officials of the truthfulness of her entire account of the incident.

- Follow up the interview of the accusing party or parties with interviews with others who had been placed "at the scene" by the complainant. Call students in for such follow-up interviews one at a time, preferably during a time block when questioning can be completed before students have the opportunity to talk to each other about the investigation.

  Involving other students will invariably mean that news of the investigation will spread throughout the school. You can attempt to control the spread of this information by asking older students not to discuss the matter with anyone but their parents. Junior or senior high school students will usually cooperate if the investigator explains that if they talk to others, questions might later be raised about "collaboration" and might jeopardize the effort to find the truth. Younger students can be told that this is a serious matter that they should discuss only with their parents. No matter what the age of the person questioned — student or adult — every additional interview multiplies the chances that other, uninvolved students and parents will become aware of the charges. Therefore, the decision as to which additional students should be interviewed should be made carefully, although a thorough investigation is obviously necessary.

  The district should have a policy or administrative rule giving administrators guidance as to when parents should be contacted before their children are questioned about any matter the school district is investigating. Generally, school boards have been reluctant to have such interviews with elementary students proceed unless the parent is contacted in advance; with older students, some policies provide that an attempt will be made to contact the parents before the interview, but if unsuccessful in reaching the parent, school officials may go ahead with the questions and let the parent know of the interview afterwards.

- Having two persons (plus, perhaps, a separate recorder) conduct the interview enhances the likelihood of getting useful information. While the interviewee is responding to the questions of the primary investigator, the second person on the interview "team" can supplement the information gathered in important ways — by asking for a needed but overlooked detail; by closely observing the demeanor, tone of voice, "body language," and expression of the person being interviewed; and by verifying, through note-taking, the precise responses of the witnesses, word for word, to important questions.

THE INITIAL CONTACT WITH THE ACCUSED STAFF MEMBER

At the time of the notice of paid suspension, the accused staff member is notified of the general nature of the charges that have been made and that the district will be conducting an investigation. However, it may be advisable not to ask the staff member to respond to any specific questions at that point.

School officials conducting an investigation, without the involvement of law enforcement officers, are not obliged to give the employee any warning of "Miranda" rights, but if the employee reacts to news of the accusations by confessing on the spot to improper sexual contact with students, there is no reason the district cannot utilize that information. Obviously, the investigation will be much curtailed as a result of the confession.

Although it is tempting to use the initial meeting with the employee as an opportunity to extract such a confession, such officials are well advised not to ask for any response from the employee at this time. Often, the employee will not have representation at this initial meeting, which is usually scheduled quickly in order to suspend the employee and separate that employee from students during the investigation. Administrator pressure may backfire, resulting in an accusation that the employee was deprived of her right to representation. The sympathy of fellow employees for the accused may be aroused by a belief that the district took advantage of the staff member under investigation.

DEVELOPING A PRELIMINARY STATEMENT OF CHARGES

Following interviews with those persons who are likely to have pertinent information about the charges, plus a review of other "evidence" such as written notes, pictures, medical reports, etc., the investigators need to develop a preliminary statement of charges that will be presented to the employee for response.

The preliminary statement of charges must be specific enough to allow the employee to have meaningful opportunity to respond. Therefore, dates, times, and places of alleged incidents, plus other details, should be provided. These charges may include matters the district wishes to discuss with the employee, even if solid evidence has not yet been developed to support those charges by even a preponderance of the evidence.

Oftentimes, the investigators will have heard second-hand reports of incidents of improper conduct, but be unable to pin down any person who can substantiate those reports through direct observation or participation. For example, in investigating and substantiating an initial complaint that a high school teacher had kissed a female student in the hallway at school, the district interviewed other females who were reported to have been involved sexually with the teacher during the prior five years. At this stage of the investigation, none of the young women would admit to having had intercourse with the teacher, but it was felt they might be protecting him. Among the questions put to the teacher was "Have you ever had sexual relations with any person who was, at that time, a student at the high school?" The teacher denied any such relationship with a student, but the superintendent and district's attorney were able to observe his demeanor in answering the question. They continued to pursue the investigation thereafter, and within a few days a recent graduate was convinced by an adult friend to tell the district about just such a sexual encounter with the teacher some three years earlier.

ALLOWING FOR THE EMPLOYEE'S RESPONSE TO THE CHARGES

The investigation usually concludes with an interview with the accused employee. Obviously, that employee has a right to representation at this point, and on some occasions the employee's attorney will develop and bring to the meeting a written response to the charges. The district, nevertheless, has the right to ask its employee questions about the possible abuse of a student. If the employee refuses to answer those questions because of possible violation of his Fifth Amendment rights, the district cannot thereby assume guilt, but the employee does lose his opportunity to have his account of the events heard and considered.

This meeting is normally attended by the district personnel officer, the school district's attorney, and the immediate supervisor. While the district's attorney typically conducts the interview, sometimes the immediate supervisor's involvement is effective. In one case, where the teacher initially denied charges that he had related to his classroom of seriously emotionally disturbed high school-aged students a detailed account of his first sexual encounter and had encouraged them to write about their sexual experiences, his supervisor spoke up an reminded him that all of the students who had been interviewed had confirmed that charge. Was he saying that those students would lie about him? He then acknowledged, reluctantly, that the incident had indeed occurred as the students described it.

Following the interview, the employee should be told that the district may need to do further investigation, but plans to conclude its investigation as quickly as possible and then inform the employee of action to be taken. In many instances, followup interviews with the same or different persons than those interviewed earlier may be necessary to "check out" information provided by the accused employee. Witnesses whose story differs from that of the employee may be directly confronted and asked to respond to the employee's account.

Where key factual differences exist in the accounts of the employee and other witnesses, the district may wish to ask the employee if there are others who should be interviewed as part of the investigation. This approach helps to avoid surprises, as those who are likely to be most supportive of the employee's account are identified and interviewed before a decision about discipline or dismissal is made.

DECIDING IF CHARGES ARE VERIFIED AND IF DISCIPLINARY ACTION/DISMISSAL IS TO BE TAKEN

When the investigation is complete, the key players — immediate supervisor, district personnel director or assistant superintendent, and the district's attorney — must review the evidence to determine (1) which charges, if any, have been verified, and (2) what disciplinary action, if any, will be taken.

It is important that only those charges which can be supported with solid evidence be named as bases for discipline. Sometimes it will be necessary to name a lesser charge if critical elements (such as intent) of a more serious charge cannot be proven. Even if the investigators concluded that sexual misconduct was not involved, but the teacher's judgment was flawed in some way, disciplinary action may be called for. For example, although it could not be proven that an elementary teacher had touched students in the genital area, as initially charged, he was disciplined for having used poor judgment in touching students on the knee or legs and interacting with students with unnecessary physical touching and excessive emotionalism. The district concluded that these characteristics of his teaching style had led to the student complaints, which had been exaggerated in the telling.

State law and the local collective bargaining agreement will determine whether the confirmed facts will constitute the basis for dismissal, or for some lesser disciplinary action. If the sexual misconduct involves students, even off-duty conduct can be the basis for dismissal since the misconduct obviously has a "nexus" with the employee's ability to work effectively for the district in close contact with students.

Most state statutes governing teacher dismissal name "immorality" and/or "neglect of duty" as grounds for the dismissal of permanent teachers. In Oregon, a teacher's unintentional contact with a female student's breasts, while positioning her violin during music class, was not judged to constitute "immorality," but the Fair Dismissal Appeals Board panel concluded that evidence of intentional contact of the same sort, for the purpose of sexual gratification of the teacher, would satisfy that statutory grounds for dismissal. *Ewart v. Parkrose School District* (unpublished decision, 1982).

In other cases where touching is not involved, but the teacher has been charged with using sexually explicit language, "neglect of duty" or "inadequate performance" may be a charge that is easier to substantiate. Oregon's Fair Dismissal Appeals Board upheld the dismissal of a high school teacher who admitted that he practiced oral sex and then proceeded during several periods that were scheduled for English and geology classes to discuss sex in an improper and embarrassing way with students in class. The immorality charges were dropped, however, and the dismissal was based upon a charge of "inadequate performance and gross unfitness to perform." *In the Matter of the Dismissal of Ancil I. Nance* (unpublished decision, 1973).

SHARING THE RESULTS OF THE DISTRICT'S INVESTIGATION WITH OTHER AGENCIES OR PARTIES

When the school district has cause to believe sexual misconduct has occurred, the district has a legal obligation to report to other parties, including child protective services and/or the appropriate law enforcement agency. The district may also be obligated to report to the teacher licensing commissions.

In addition, the district must carefully consider what information, if any, about the district's action should be released to complaining parents and students. If dismissal is recommended an acted upon by the school board, that action will be public and can be communicated to the complainants. If lesser disciplinary action is taken and recorded in the employee's personnel file, rules of access to that file may dictate that parents and students cannot review such material. However, complainants desire and deserve some response from the district. They can be told, "We have verified most aspects of your complaint and have taken appropriate action with the employee," or "After investigation, we could not confirm the facts alleged in your complaint."

When the employee is cleared of all charges of sexual misconduct and returned to work, it is important that the complainants be so informed, so that the employee can continue to work for the district without continuing rumors and suspicions. If the district fails to communicate its findings, the district may find itself named in litigation charging defamation, especially if the employee seeks work elsewhere but is not hired due to unfounded reports or rumors by community residents. Of course, the employee's effectiveness and acceptance by parents and students in the future will be eroded if the district fails to communicate that its investigation cleared the employee.

EVALUATING THE INCIDENT: LESSONS FOR THE FUTURE

Regardless of the action ultimately taken, every instance where an employee is charged with sexual misconduct deserves a "post-mortem" review to determine what steps could be taken to prevent a recurrence. Perhaps new, clearer policies are needed, or perhaps staff should receive inservice training about appropriate means of disciplining students or giving positive reinforcement, short of physical contact. In one district, after a rash of charges of inappropriate sexual contact with students, some verified and others not, the local teachers' association decided to make presentations at faculty meetings to educate staff about the need to exercise caution in their contacts with students. In another district, where unfounded complaints against teachers had arisen shortly after students viewed a filmstrip on "good touching, bad touching," the district decided to review the instructional materials and methods it was using to warn children about sexual abuse.

CONCLUSION

Charges of sexual misconduct by school staff members are, unfortunately, no longer rarities. The school district must deal with such complaints with a sensitivity to the rights of all parties. Although there will invariably be strong public feelings and pressures against the charged employee, the district that responds to such complaints with a systematic investigatory process ultimately retains the confidence of both staff and the community.

DUE PROCESS ISSUES A SCHOOL DISTRICT CONFRONTS WHEN AN EMPLOYEE IS ACCUSED OF CHILD ABUSE

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When a school employee is accused of child abuse, the matter can quickly become very emotional and highly publicized. School attorneys and administrators responsible for pursuing disciplinary action against an employee accused of child abuse must not lose sight of the employee's constitutional right to due process.

The due process clause of the Fourteenth Amendment of the United States Constitution protects a public employee's right to property and liberty interests in employment. *See Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The purpose of this article is to review due process issues which a public school district confronts in disciplining an employee for child abuse. The topics have been organized into three categories. The first reviews issues which arise when an employee has a constitutionally protected property interest. The second discusses due process issues related to the liberty interest. The third discusses collective bargaining issues arising out of child abuse allegations.

DUE PROCESS FOR EMPLOYEES WHO HAVE A "PROPERTY" INTEREST IN THEIR JOBS

The first issue a school district encounters is the determination of whether an employee has a "property" interest in continued employment. In *Board of Regents of State Colleges v. Roth,* the Supreme Court held that to have a "property" interest in public employment, a person must have more than an abstract need or desire for it or unilateral expectation of it. The person must have a legitimate claim of entitlement to it. *Id.* at 577, 92 S. Ct. at 2709. Absent some state or local statute, rule, regulation or contract, under which an employee may be dismissed only for cause, a public school employee does not have a "property" interest in employment. This is typically the case with a probationary employee. An employee who does not have a "property" interest in employment can generally be dismissed at any time, without cause.

When a school employee has a "property" interest in his or her employment, the due process clause of the Fourteenth Amendment provides the employee with certain rights which must be satisfied before discipline can be imposed. A school employee who is considered "permanent" or "tenured" typically has a constitutionally protected property interest in his or her job and can be dismissed only for cause.

In *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 [23 Ed. L. Rep. 473] (1985). The Supreme Court set forth the standard for due process which must be met in disciplining a permanent employee. The Court held that, at a minimum, pre-discipline safeguards must include: (1) notice of the charges against the employee; (2) an explanation of the employer's evidence; and (3) an opportunity for the employee to present his or her side of the story. *Id.* at 546, 105 S.Ct. at 1495.

The Supreme Court's decision was based in part on the fact that the employee plaintiffs were entitled, under applicable state law, to a post-discipline full evidentiary hearing to determine whether or not cause existed to discipline them. If applicable procedures require a full evidentiary hearing before the imposition of discipline, the standard set forth in the *Loudermill* case must still be met. In those cases where applicable state law, rules, regulations, policies or a contract call for a post-discipline evidentiary hearing, the hearing must be provided "at a meaningful time". *Id.* at 546-547, 105 S.Ct. at 1495-1496.

What are the consequences for a school employer that fails to satisfy the due process requirements of the *Loudermill* decision? An Arkansas federal district court answered this question in *Tolson v. Sheridan School District,* 703 F.Supp. 766 [51 Ed. L. Rep. 825] (E.D. Ark. 1988). The case involved a permanent school bus driver who had been dismissed because of his alleged inability to "handle bus driving in a manner that is emotionally safe for children" and his purported "strange" behavior.

The district did not give the bus driver any reasons for his dismissal or statement of charges. The bus driver asked for the names of the persons who complained about him, but was denied this information. The bus driver was given an opportunity to address the district's governing board, but was not allowed to call or cross-examine witnesses. In addition, the district's superintendent provided the governing board with "support information", to which the bus driver was never given access. The court held that the school district's actions constituted a total lack of due process and ordered the bus driver reinstated with back pay. *Id.* at 773.

In *Vanelli v. Reynolds School District No. 7,* 667 F.2d 773 [13 Ed. L. Rep. 366] (9th Cir. 1982), a first year probationary teacher was dismissed midyear after some female students complained that he had stared at their "physical attributes" and had made statements to them with sexual overtones. When he was given a letter notifying him that he had been suspended, the teacher requested to appear at the district's next governing board meeting to respond to the students' allegations. The teacher was told not to attend the meeting. At the next governing board meeting, the board voted to terminate the teacher's contract. Another school board meeting was held later, at which the teacher was represented by an attorney, allowed to present evidence on his behalf, and permitted to cross-examine the witnesses against him. The court held that the post-termination hearing met the standards of due process, but that the school district's failure to provide the teacher any pre-disciplinary due process constituted a deprivation of his "property" interest. *Id.* at 780-781.

The next part of this article will review the following elements of procedural due process involved in the discipline of a public school employee for child abuse: (1) notice; (2) the employee's right of access to evidence against him/her; (3) the employee's right to confront witnesses; and (4) fairness issues related to a disciplinary proceeding.

Notice

An important element of due process is that an employee must be given notice of the charges which form the basis for disciplinary action. In the *Loudermill* case, the Supreme Court stated that the notice could be oral or in writing. 470 U.S. at 546, 105 S.Ct. at 1495. Beyond this requirement, however, the Court did not provide direction as to how much notice is required or what form the notice must take. This does not mean that school districts are without guidance. Typically, the statute, rule, procedure, or contract applicable to the disciplinary matter will prescribe the form of the notice. For example, in *Shipley v. Salem School District 24J, Marion County,* 64 Or. App. 777, 669 P.2d 1172 [13 Ed. L. Rep. 1111] (1983), the court reviewed whether sufficient notice was given to a dismissed teacher. Applicable state law required that the teacher be given written notice containing the statutory grounds for the dismissal and a plain and concise statement of facts relied on to support the statutory grounds. O.R.S. 342.895(2).

The teacher had received a written notice of dismissal stating that it would be recommended that he be dismissed for "immorality" and "gross unfitness". O.R.S.

342.865(1)(b), 342.865(l)(i) and 342.175(c). The notice stated that the facts relied on to support the statutory grounds for dismissal involved allegations by a child described in a civil complaint filed against the teacher, a copy of which was attached to the notice and incorporated therein by reference. The complaint alleged that during a five-month period the teacher assaulted and battered the child on twelve separate occasions. The court held that a discipline notice had to contain sufficient detailed information to inform the teacher of the allegations and charges against him so that he could prepare an adequate defense. The court ruled that the school district's notice met this standard. 669 P.2d at 1174.

The standard set forth in the *Shipley* case is consistent with the standard adopted by other courts in the absence of a statute-based notice requirement. *Benson v. Board of Education of the Washingtonville Central School District,* 583 N.Y.S. 2d 594 [74 Ed. L. Rep. 1254] (1992). In order to satisfy due process, a notice of charges must reasonably apprise the employee of the charges being made so that an adequate defense can be mounted. When disciplinary charges are based on allegations of child abuse, it can be difficult to gauge how much specificity is required. A review of cases provides some direction.

In *Casada v. Booneville School District No. 65*, 686 F. Supp. 730 [47 Ed. L. Rep. 541] (W.D. Ark. 1988), a teacher was dismissed for allegedly making sexual advances toward his students. District officials met with the teacher and gave him a letter indicating that the reason for the termination recommendation was "sexual advances, by you, towards students..." *Id.* at 731. The school district refused requests from the teacher's attorney for a description of the allegations, dates the alleged incidents occurred, persons making the allegations and copies of any documents upon which the dismissal recommendation was based. The school district did, however, provide the teacher with a hearing. The court held that the district violated the teacher's due process rights because it failed to provide him with clear and actual notice of the reasons for termination in sufficient detail to enable him to present evidence related to them. *Id.* at 733.

In *Land v. Commissioner of Education of the State of New York,* 571 N.Y.S. 2d 623 [68 Ed. L. Rep. 488] (1991), the court upheld a teacher's two-year suspension based on charges of unprofessional conduct. The case did not involve allegations of child abuse. The tenured teacher claimed that her due process rights were violated because the notice of charges she received did not specify state or federal laws she allegedly violated. The notice charged the teacher with 16 specific factual instances of unprofessional conduct. The court held that the failure of the notice of charges to specify federal and state laws allegedly violated did not deprive the teacher of due process. The teacher was adequately advised of the nature of her offending conduct. *Id.* at 625.

The following standards can be gleaned from the above cases. First, a school district must faithfully comply with any statute, rule, regulation, procedure, policy or contract which establishes requirements for the form of notice of disciplinary action or statement of charges. Even if not required, a notice of charges should be in writing. The charges should be prepared with sufficient specificity to reasonably apprise the employee of the allegations being made so that an adequate defense can be mounted. If a statute, rule, regulation or contract uses specific terms of art for disciplinary action (*e.g.*, unprofessional conduct, immorality, dishonesty, neglect of duty), such terms of art should be specifically set forth in the notice of charges. Further, the notice should contain: a description of the conduct at issue; dates, times and locations where the alleged incidents occurred (if known); and the identity of persons making, or who will likely be called to testify about the allegations.

Access to Evidence

In the *Loudermill* decision, the Supreme Court held that an accused employee be given at least "an explanation of the employer's evidence." 470 U.S. at 546, 105 S.Ct. 1495. The decision is, however, silent about when and how the explanation is to occur. Does it include the right to copies of all documentary evidence? Does it include a right to examine the physical location where the acts giving rise to the disciplinary action occurred (*i.e.*, access to a classroom where an alleged molestation occurred)? Does it include disclosure of the identity of all witnesses?

The best way to avoid a due process claim in this area is to be forthcoming with the evidence that supports the discipline sought. At a minimum, an employee should be informed that he or she has a right to obtain copies of all documentary evidence which will be relied on in imposing discipline. A statement to this effect can be included in the notice of charges. Better practice is to provide the employee with copies of all documents upon which the discipline is based when giving the employee the notice of charges. This should include relevant witness statements, unless the statements are somehow privileged or the school district is under a lawful obligation to maintain the confidentiality of the statements. Many states have mandatory child abuse reporting statutes. Oftentimes statements made in the context of child abuse reporting are required to be kept confidential. *See,* Gittins, "Responding to Child Abuse in the Schools: Issues in Interagency Cooperation," at pages [ ]. Upon request, an accused employee should be given access to and the ability to examine a physical location under district control where an alleged child abuse incident occurred. The access should be supervised, occur at a reasonable time, and should not disrupt the normal activities of the school or the site.

In *Jones v. Board of Education of Township High School District No. 211, Cook County, Illinois,* 651 F. Supp. 760 [37 Ed. L. Rep. 529] (N.D. Ill. 1986), the court upheld a three-day suspension of a teacher who used excessive physical force against a student. The teacher claimed his rights were violated because he had not been given copies of student-witness statements before his administrative hearing concerning the suspension. The court held that there was no due process violation because two weeks prior to the hearing the teacher had been given a list of the students who had been interviewed by district officials. The court ruled that the teacher could have talked to any of the students prior to the hearing. Further, the teacher was furnished copies of the statements at the hearing and his attorney used them when cross-examining the students. *Id.* at 767.

Most school districts, when taking disciplinary action against an employee, act pursuant to established procedures. Typically, the procedures address an employee's access to the evidence against him or her. If an applicable rule requires the disclosure of witness identities, it must be complied with. This should be done sufficiently in advance of the due process hearing to enable the employee to prepare an adequate defense. Even in the absence of such a rule, witnesses should be disclosed to an employee upon request. It is far better to disclose witnesses, when requested, than later defend against an employee's claim that his or her due process rights were violated because the identity of the accusers was not disclosed when requested.

An Employee's Right to Confront Witnesses

When a school district disciplines a permanent employee on any basis, including child abuse, at some point it must give the employee an opportunity for an appeal hearing at which the district must establish cause for the disciplinary action. Whether the hearing occurs pre-discipline or post-discipline, an essential element of due process is that the employee be given an opportunity to confront and cross-examine adverse witnesses. *See Goldberg v. Kelley,* 397 U.S. 254, 270-271, 90 S.Ct. 1011, 1021 (1980). *See also, Tolson v. Sheridan School District, supra; and Casada v. Booneville School District No. 65, supra.* When discipline is based on allegations of child abuse, however, the rights of the accuser must be balanced against the rights of the accused.

In *Elvin v. City of Waterville,* 573 A.2d 381 [60 Ed. L. Rep. 79] (Me. 1990), a teacher was discharged for maintaining a sexual relationship with a high school student. At the dismissal hearing, the school board received and considered an affidavit submitted by the student, who did not testify. The teacher claimed that the board, by considering the student's affidavit, deprived the teacher of her right to confront and cross-examine the student. The court rejected this contention, however, holding that the affidavit represented only a small part of the evidence before the governing board. The court ruled that the affidavit merely corroborated evidence introduced from other sources that the teacher had an opportunity to cross-examine and rebut during the hearing. The evidence included admissions by the teacher that she had sex with the student several times. The court noted that the board had no power to compel witnesses to testify at the administrative hearing. *Id.* at 383-384.

In *Hall v. Board of Education of the City of Chicago,* 169 Ill. Dec. 758, 592 N.E.2d 245 [74 Ed. L. Rep. 1223] (1992), a teacher was dismissed for providing drugs and alcohol to, and having sex with, two students. A friend of the teacher had pled guilty to a criminal sexual assault charge that resulted from an incident which was the basis of some of the charges against the teacher. During the administrative proceeding, the friend testified against the teacher and was permitted to exercise his Fifth Amendment privilege against self-incrimination. His testimony was restricted to those matters for which he had been convicted. The school district also failed to produce one of the juvenile victims. The teacher claimed he was effectively denied his right to cross-examine his accusers. The court rejected this claim. The court held that the order restricting questioning to protect the friend's constitutional right against self-incrimination did not prohibit the teacher from cross-examining him about the real issues in dispute. The court also held that the teacher's rights were not violated when one of the juvenile victims was not called by either party as a witness. 592 N.E.2d at 770-771.

The lesson of these cases is that during a due process evidentiary hearing, an employee must be given the right to cross-examine each witness who testifies on behalf of the school district during the hearing. Witnesses who will likely be called to testify during a disciplinary hearing should be made aware of this and be prepared to undergo detailed cross-examination about their direct testimony. The right to cross-examine witnesses, however, does not extend to persons who do not provide testimony during a due process hearing. The use of testimonial evidence during an administrative hearing in the form of affidavits or declarations which corroborate and substantiate other evidence properly introduced into the proceeding does not violate an employee's right to cross-examine witnesses against him or her.

Fairness Issues

Fairness is a fundamental element of due process. This applies to both the manner in which an administrative proceeding is conducted and the person or persons before whom a matter is held. *See Withrow v. Larkin,* 421 U.S. 35, 46-47, 95 S.Ct. 1456, 1464 (1975). In most states the final decisionmaker in the disciplinary process is the publicly elected governing board of the school district. These are members of the community who bring with them to office the sorts of relationships, opinions, values and perspectives that, as humans, we all have. In a disciplinary action involving allegations of child abuse, it is not unusual for an administrator or a school board member to have an established relationship with the accused employee, victim, witnesses, and their respective families. Public officials are also exposed to the same sorts of information that all civic minded citizens are sensitive to, such as television news reports, newspaper articles, rumor and gossip.

It is therefore not unusual for an accused employee to claim a due process violation based on bias, lack of impartiality or some other conflict of interest involving the decisionmaker. In *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976), the Supreme Court established the standard for determining when the decisionmaker in a public employee disciplinary matter should be disqualified from making or participating in the determination of whether cause for the disciplinary action exists. The case was brought by a union that represented a group of teachers who were dismissed after a strike against a Wisconsin school district. The determination of whether the teachers should have been dismissed was made by the district's governing board. The teachers claimed that their due process rights were violated because the board members had been involved in the unsuccessful collective bargaining that brought about the strike. The teachers claimed that the board members had a personal or financial stake in the decision whether or not they should be dismissed.

The Supreme Court held that the teachers' due process rights were not violated. Noting that the school board's participation in the negotiations that precipitated the strike was a statutory duty imposed under state law, the Court held:

> Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker. [Citations omitted.] Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances."

Id. at 492-493, 96 S.Ct. at 2314.

Under the *Hortonville* decision, a person who has a personal or financial stake in the outcome of a disciplinary proceeding cannot serve as a decisionmaker. However, a decisionmaker is not deemed unfit simply because of familiarity with the facts of a case. In addition, a decisionmaker is not disqualified simply because he or she has taken a position, even in public, on a policy issue related to the dispute.

In order to establish a due process violation based on some characteristic of the decisionmaker, the employee has the burden of showing that the decisionmaker is not capable of judging a particular controversy fairly on the basis of its own circumstances. The following cases assist in determining when a decisionmaker (*i.e.*, school board, hearing officer or administrative hearing panel) has a disqualifying conflict of interest.

In *Rickel v. Cloverleaf Local School District Board of Education,* 79 Ohio App.3d 810, 608 N.E.2d 767 [80 Ed. L. Rep. 969] (1992), a teacher challenged a board of education's decision not to renew his teaching contract. He claimed that a board member's daughter was a substitute teacher for the district who would benefit from the nonrenewal of his contract. The court ruled that there was no due process violation because the teacher failed to present any evidence to support his accusations. The teacher's mere accusation that the board member had a stake in the outcome, without supporting evidence, failed to establish a due process violation. *Id.* at 816, 608 N.E.2d at 771-772.

In *Vanelli v. Reynolds School District No. 7,* 667 F.2d 773 [13 Ed. L. Rep. [366]] (9th Cir. 1982), a high school teacher was dismissed mid-year because of offensive sexual conduct. An evidentiary hearing was conducted before the district's governing board, which voted to terminate the teacher's contract. The teacher claimed that he was denied due process because a board member refused to recuse himself from the hearing even though the board member's son was dating one of the girls who complained about the teacher. The court held that the teacher's due process rights were not violated. The court ruled that school board members in smaller communities may well have some knowledge of the facts and individuals involved in incidents which they must evaluate. Nevertheless, their obligation is to act impartially and in a fair manner. The court ruled that the teacher had not shown that the board member was disqualified on the ground of bias or that the board member's actions deprived the teacher of a fair hearing. *Id.* at 780.

In *Danroth v. Mandaree Public School District No. 36,* 320 N.W.2d 780 [4 Ed. L. Rep. 1253] (N.D. 1982), a teacher whose contract was not renewed sued, claiming she was denied a fair hearing because the wife of a school board member was one of the principal objectors to the renewal of her contract and had threatened to withdraw her child from the school if the teacher was retained. The court ruled that there was no due process violation. The court stated:

> We also take notice that in many school board elections the persons seeking the office of school board announces that he or she has children, implying that because of this fact they are well qualified and will have a strong interest in school matters. How can we then justifiably say that whenever a school board member has a personal interest because of a child or children attending school, the school board member should disqualify himself or herself?

Id. at 784.

The cases discussed above recognize that school board members are participants in the communities they serve. Through family and personal relationships, governing board members sometimes become familiar with the facts of the case in which they are involved as a decisionmaker. The mere fact that a school board member may have a relationship with a victim or an accuser in a disciplinary matter does not, in and of itself, establish bias. There must be more. Further, an employee who claims a decisionmaker had a disqualifying conflict of interest has the burden of proving it.

Occasionally, a teacher is able to establish a charge of bias against a school board or one or more of its members. In *Crump v. Board of Education of the Hickory Administrative School Unit,* 378 S.E.2d 32 [52 Ed. L. Rep. 722] (N.C. 1982), a teacher was dismissed for insubordination and immorality based on a series of incidents involving some female students. At the start of the dismissal hearing before the school district's governing board, the teacher's attorney questioned board members about their ability to be fair and impartial. The attorney asked them to state the extent to which any of them had been personally involved in the matter or had discussed the matter with people who had knowledge of it and whether any of them had formed any preconceived notions. The board members effectively denied any connection with the case beyond a cursory knowledge of the nature of the charges and later voted to dismiss the teacher.

The teacher sued, and evidence presented at the civil trial demonstrated the board members had not been candid about themselves. The teacher presented evidence establishing that board members had several discussions with current and former district personnel concerning the matter, including an attempt to convince the teacher to resign, despite their disavowal of such conversations. The court ruled that the matter did not involve school board members who had merely conducted a prehearing investigation, or who had formulated opinions about the matter they were to decide. The court held that the school board's prehearing involvement in the matter, when coupled with denials at the hearing of any involvement in or familiarity with the case, sufficiently demonstrated disqualifying personal bias. *Id.* at 39.

The procedures by which due process is provided to public school employees vary significantly. Nevertheless, disciplinary matters conducted under all forms of administrative procedure share the common thread that the final determination must be made by a neutral and detached decisionmaker. The decisionmaker, whether a school board, administrative panel or hearing officer, must avoid the appearance of impropriety in the manner in which the hearing is conducted and the decision rendered. This is particularly critical during the deliberation process. Actions which may appear to give the school district an advantage during deliberations have been found to violate due process.

In *deKoevend v. Board of Education of Westend School District RE-2,* 688 P.2d 219 [20 Ed. L. Rep. 702] (Colo. 1984), the school district sought to dismiss a teacher based on charges which included improper physical and verbal conduct toward students. The charges had been initiated by the district's superintendent, who testified on behalf of the district during the administrative hearing. The teacher's principal gave detailed testimony at the hearing as well. The matter was heard by a hearing officer, who recommended dismissal. When the district's governing board met in closed session to consider the hearing officer's findings and recommendations, the superintendent and principal were present. The court held that the presence of the superintendent and the principal during the board's deliberations violated the teacher's due process rights. The court ruled that both administrators had a substantial interest in the outcome and that their presence during the board's deliberations "substantially undermined the appearance of impartiality of the board's review of the hearing officer's findings". *Id.* at 227-228.

It must be noted that the mere "image of impropriety" is insufficient to establish a due process violation, absent evidence which establishes bias. In *Board of Directors of Fairfield Community School District v. Justmann,* 476 N.W.2d 335 [70 Ed. L. Rep. 964] (Iowa 1991), a school board terminated a teacher/coach's contracts based on findings that he solicited and engaged in sexual relations with one of his students. The district's superintendent prosecuted the charges against the teacher and a nonparticipating board member was a witness on behalf of the district. The court upheld the dismissal, holding that an administrative adjudicator enjoys a presumption of honesty, integrity and objectivity. The court ruled that neither the superintendent's role as prosecutor nor the nonparticipating board member's role as a witness was sufficient to rebut this presumption in the absence of direct, compelling evidence to the contrary. *Id.* at 339-340.

A fair hearing is conducted by a neutral, disinterested decisionmaker. A person who has some stake in the outcome of a disciplinary proceeding should not serve as a decisionmaker. In addition, persons who serve as advocates or witnesses for a school district or an employee during a disciplinary proceeding should not be involved in the deliberations. If an administrator prosecutes discipline against an employee arising out of child abuse allegations, the administrator should serve no other role in the proceeding. Similarly, if a board member is a witness in such a matter, he or she should not use his position and access to other board members to influence the outcome of the proceeding.

DUE PROCESS RIGHTS RELATED TO AN EMPLOYEE'S "LIBERTY" INTEREST.

In *Board of Regents of State Colleges v. Roth,* the Supreme Court also reviewed a public employee's "liberty" interest which arises in the employment context. The case involved an assistant professor who had no tenure rights and who was informed that he would not be rehired after his first academic year. He claimed that his employer's actions deprived him of "liberty" protected by the Fourteenth Amendment. The Supreme Court rejected his claim, but went on to explain the process due a public employee when his or her dismissal implicates a "liberty" interest.

The Supreme Court held that a "liberty" interest is implicated when an employee is charged by a public employer with conduct which stigmatizes him or disables him from taking advantage of other employment opportunities. This occurs, for example, when an employee is charged with conduct which involves dishonesty or immorality. In such a case, due process requires that the employee be given an opportunity to refute the allegations made by the public employer. The purpose of such notice and a hearing is to provide the employee with an opportunity to clear his or her name. 408 U.S. at 573, fn. 12, 92 S.Ct. at 2707, fn. 12; *See also, Diehl v. Albany County School District No. 1,* 694 F.Supp. 1534, 1536 [49 Ed. L. Rep 592] (D. Wyo. 1988).

The Supreme Court has held that stigmatization is not the only element necessary to implicate a public employee's liberty interest. In *Codd v. Velger,* 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977), a probationary police officer was dismissed because of an apparent suicide attempt while he was a trainee. He claimed he was entitled to a name-clearing hearing due to the stigmatizing effect of certain material placed in his personnel file related to the dismissal. The Supreme Court held that the former police officer was not entitled to a name-clearing hearing because he did not assert that the personnel file material concerning the apparent suicide attempt was substantially false. The Supreme Court ruled that the purpose of a liberty interest hearing is to provide an employee with an opportunity to clear his or her name. In order for the hearing to serve a useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation. The Supreme Court held that an employee is entitled to a name-clearing hearing if he challenges the truth of disciplinary charges. The name-clearing hearing is required only if an employer creates and disseminates a false and defamatory impression about the employee in connection with disciplinary action. *Id.* at 626-627, 97 S.Ct. at 883-884.

Which Employees Enjoy Liberty Interest Due Process Rights?

The first question which arises in reviewing a school employee's liberty interest rights is which employees enjoy such rights? As noted above, the instructor in the *Board of Regents of State Colleges v. Roth* case had no tenure. Thus, a liberty interest exists in favor of all public employees, even those who have no property right in their employment.

When Is (and Is Not) An Employee's Liberty Interest Implicated?

The next question is when is a school employee's liberty interest implicated by a school employer's actions? In *Bishop v. Wood,* 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976), a police officer claimed that his dismissal violated his due process rights. During a meeting with the city manager of the city that had employed him, the officer was informed that his dismissal was based on a failure to follow orders, poor attendance at police training classes, causing low morale and conduct unsuited to an officer. These charges, however, were not put in written form and not communicated to the public. The Supreme Court held that a public employee's liberty interest is implicated when there is public disclosure of stigmatizing reasons for the disciplinary action taken against an employee. *Id.* at 348, 96 S.Ct. at 2079.

In *Wefel v. Rockwood R-6 School District,* 779 F. Supp. 468 71 Ed. L. Rep. 1015] (Mo. 1991), the school district allegedly placed a letter in a retired librarian's personnel file which characterized her as a "liar and a fake". The re-tired librarian sued the district, claiming she had a right to a liberty interest name-clearing hearing because potential employers could access her personnel file and the letter, resulting in stigmatization to her reputation. The court held that the school district did not deprive the librarian of a protected liberty interest without due process because state law and district policy prevented the disclosure of the letter. Absent public disclosure, the teacher was not entitled to a name-clearing hearing to refute the information allegedly claimed in the letter. *Id.* at 471.

Given that an employee's liberty interest is implicated by charges involving moral turpitude, most disciplinary cases involving charges of child abuse will implicate liberty interests. When child abuse or similar disciplinary charges are leveled against an employee, it can be very difficult for a school district to avoid public disclosure of the reasons for disciplinary action. In such a case, public disclosure by the school district should be avoided whenever possible. If public disclosure cannot be avoided, a school district must provide an accused employee with an opportunity for a name-clearing hearing. The name-clearing hearing provides the employee with an opportunity to tell his or her side of the story. If an employee has a property interest in his or her job, a due process hearing which protects a property interest is also sufficient to protect the liberty interest.

Although it is very important to be able to identify when action taken against a public school employee implicates his or her liberty interest, it is equally important to know when a liberty interest is not implicated. In *Loehr v. Ventura County Community College District,* 743 F.2d 1310 [20 Ed. L. Rep. 70] (9th Cir. 1984), a community college district's superintendent claimed that his liberty interest rights were violated in the termination of his employment contract. The governing board that voted to terminate his employment contract never publicly stated any reason for its action, except a belief that he failed to perform competently as superintendent and could no longer work effectively with the board or other administrative personnel. The former superintendent also claimed that certain governing board members had made public statements which connected him to a noncriminal grand jury investigation, incorrectly leading the public to believe that the governing board had given him due process, and falsely charged him with various malfeasance. He also claimed that the governing board conducted public meetings which encouraged others to ridicule him.

The court held that none of these allegations involved a deprivation of any liberty interest. The court ruled that to implicate constitutional liberty interests, the reasons for dismissal must be sufficiently serious to stigmatize or otherwise burden the person so that he or she is not able to take advantage of other employment opportunities. The court noted that other appellate courts had set the boundary of liberty interests at accusations of moral turpitude, such as dishonesty or immorality. The court held that charges that do not reach this level of severity do not infringe constitutional liberty interest. *Id.* at 1317.

In *Martin v. Unified School District No. 434, Osage County, Kansas,* 728 F.2d 453 [16 Ed. L. Rep 424] (10th Cir. 1984), a school principal whose contract was not renewed claimed that the action and statements made by school board members after his nonrenewal impaired his liberty interest. The only specific statement cited by the principal was that of the school board's president, who was quoted in a local newspaper as saying that the principal's nonrenewal was based "on occurrences this year and continuance of previous concerns". The court held that the principal's liberty interests were not impaired. The court ruled that the nonrenewal of his contract did not implicate a liberty interest. The court also ruled that the single statement cited by the principal stigmatized him no more than the nonrenewal of his contract. *Id.* at 456. In general, courts have held that the non-renewal of a public school employee's contract, absent stigmatizing charges or allegations, does not amount to a deprivation of liberty. *See Short v. School Administrative Limit No. 16,* 612 A.2d 364, 369 [77 Ed. L. Rep. 317] (N.H. Sup.Ct. 1992); and *Suber v. Bullock County Board of Education,* 722 F. Supp. 736, 741 [56 Ed. L. Rep. 947] (S.D. Ga. 1989).

In *Yatvin v. Madison Metropolitan School District,* 840 F.2d 412 [45 Ed. L. Rep. 43] (7th Cir. 1988), the court held that a principal who was denied several administrative appointments because she lacked managerial experience did not state a liberty interest violation. The court ruled that the grounds for the denials were not stigmatizing in the sense of being defamatory or even derogatory and had not been publicized. The court stated that a routine denial of a promotion to a position for which there are competing applicants "is not the stuff out of which a violation of due process is made". *Id.* at 417.

In *Hayes v. Phoenix-Talent School District No. 4,* 893 F.2d 235 [58 Ed. L. Rep. 45] (9th Cir. 1990), the court held that there was no liberty interest deprivation in the nonrenewal of a probationary principal's contract. The court ruled that the reasons given to the principal for his nonrenewal amounted to incompetence, inability to relate well with others, and lack of tact. The court held that it would stretch the concept of liberty too far to suggest that a person dismissed for these reasons was deprived of a liberty interest. *Id.* at 237.

The Name-Clearing Hearing

When a school district publicizes stigmatizing disciplinary charges, the employee's liberty interest is implicated and a name-clearing hearing is required if requested by the employee. The purpose of the hearing is to provide the employee with an opportunity to clear his or her name. *See Codd v. Velger,* 429 U.S. 624, 628, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977).

As noted above, two fundamental requirements of due process are the opportunity to be heard at a meaningful time and in a meaningful manner. *See Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976). If a school district has specific statutes, rules, regulations or policies which establish parameters for conducting a name-clearing hearing, those procedures should be followed. In the absence of established procedures, due process requires a school district to undertake a "fundamentally fair process" affording the employee with an opportunity to explain why disciplinary action should not be taken. *See Hoffman v. Board of Trustees,* 567 So.2d 838, 840 [63 Ed. L. Rep. 373] (Miss. 1990); and *Cleveland Board of Education v. Loudermill, supra.*

Does due process require a name-clearing be held prior to publication of stigmatizing charges? In *Rankin v. Independent School District No. I-3, Noble County, Oklahoma,* 876 F.2d 838 [54 Ed. L. Rep. 159] (10th Cir. 1989), a dismissed teacher claimed his due process rights were violated because he was not provided a hearing before his employing school district published stigmatizing reasons for his discharge. The court held that a person's liberty interest is not implicated until the stigmatizing information is published. The court noted the advantages of a pre-publication hearing to a prudent public employer who wishes to avoid liability for a liberty interest deprivation. Still, the court ruled that a name-clearing hearing is constitutionally adequate if it occurs after publication. *Id.* at 842. *See, also, Williams v. Conroe Independent School District,* 809 So.2d 954 [68 Ed. L. Rep. 189] (Tex. 1991).

COLLECTIVE BARGAINING ISSUES RELATED TO DISCIPLINE ARISING OUT OF CHILD ABUSE ALLEGATIONS

Child abuse by a school employee constitutes just cause for appropriate disciplinary action. Arbitrators, hearing officers and judges will follow the traditional notion that the "punishment" must fit the conduct involved. The more egregious the employee's behavior, the more substantial the discipline. Immoral conduct with a student is grounds for dismissal. *Gardner v. Commission on Professional Competence,* 164 Cal.App.3d 1035, 210 Cal.Rptr. 795 (1985). Sexual abuse of a student cannot, and will not, be tolerated in the school setting. Abusive conduct towards a student which does not constitute sexual misconduct will likely result in less disciplinary action. Behavior such as excessive use of force, or upbraiding a student is processed along more traditional lines of progressive discipline. For example, in *In Re Board of School Trustees of Gary Community School Corporation and Gary Teachers Union, Local 4, A.F.T.,* 80 L.A. 1065 (1983), an arbitrator ruled that a school board properly imposed a two-day suspension on a teacher for using an aluminum pole with a hook on the end to tap a student on the head. The contract between the school district and the teacher's union allowed teachers to use corporal punishment so long as it was administered in an objective manner and in such a way that no permanent injury could result. The arbitrator held that the teacher's use of the pole could have caused the student permanent injury and was not the kind of corporal punishment sanctioned by the collective bargaining agreement or state law.

On the other hand, in *West Monona Community School District,* 93 L.A. 414 (1989), an arbitrator found just cause to dismiss a counselor who had gone on a joy ride with some students which resulted in an accident. The accident left one student dead and another paralyzed. Although the counselor had a clean disciplinary record, the arbitrator ruled that the counselor's conduct constituted "just cause" to terminate his employment. *Id.* at 422. The rules for collective bargaining applicable to school districts vary considerably from state to state. When disciplinary procedures are a mandatory subject of collective bargaining, attorneys and administrators must be aware of contractual, as well as constitutional, considerations.

First, disciplinary procedures need to comply with the constitutional standards discussed above concerning notice, access to evidence, and the conduct of a disciplinary hearing. Second, whatever disciplinary procedures a school district agrees to through collective bargaining must be complied with. Arbitrators, hearing officers and judges typically do not hesitate to overturn disciplinary action taken against an employee when a school district has failed to comply with elements of its disciplinary procedures, such as notice requirements, time limitations or rules applicable to production of evidence. Similarly, a school district's failure to comply with its contractual obligations concerning subjects such as placement of documents in personnel files or evaluation procedures can result in the reversal of a dismissal or lesser form of discipline. *Paramount Unified School District and Teachrs Association of Paramount,* 90-2 ARB ¶ 8338 (1989).

Finally, whatever is agreed to in collective bargaining must be consistent with applicable state law. For example, in *Thombleson v. Board of School Trustees of Central School District of Greene County,* 492 N.E.2d 327 [31 Ed. L. Rep. 1242] (Ind. App. 1986), the court voided a clause in the collective bargaining agreement between a public school district and a teachers' union which provided a "fair hearing opportunity" for probationary teachers concerning nonrenewal decisions. The court held that the provision was void because it conflicted with the applicable state teacher tenure law. *Id.* at 333.

TRYING A CASE OF TEACHER SEXUAL MISCONDUCT

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INTRODUCTION

A school district's ability to dismiss a teacher for sexual contacts with a minor on school property is unequivocally established in every jurisdiction in this country. In contrast, a district's ability to dismiss a teacher because it objects to the propriety of personal relations between the teacher and a consenting adult in the privacy of the teacher's home has not been unequivocally established. Between these two extremes the law has swung, buffeted by changing community morals and expectations, and an evolving legal doctrine that affords teachers and student victims new and complex vehicles for relief.

This article explores from the practitioner's point of view the conduct of the discharge hearing or trial. It does not focus on hearing procedures or advocacy techniques. Hearing procedures are usually grounded in state statutes or local contract, and advocacy techniques are not unique to this topic. Rather the focus will be the elements that must be shown, almost universally, in order to justify teacher dismissal. This article then considers the application of those elements to particularly vexatious problems that typically can arise when districts seek a dismissal for sexual misconduct including:

- Evidentiary problems with children as witnesses;
- Remediation;
- Collateral liability; and
- Criminal charges.

ELEMENTS OF TEACHER DISMISSAL FOR SEXUAL MISCONDUCT

While the terminology varies between jurisdictions, to dismiss a teacher for sexual misconduct generally two elements must be shown:

- the occurrence of improper sexual behavior; and
- a nexus between the offensive behavior and the completion of a teacher's professional responsibilities.

Improper Sexual Behavior

Sexual contacts between a teacher and a minor student in general are illegal. However, teachers have claimed the right to have consensual sexual relations with students who are not minors or who are above the legal age for capacity to consent. This claim has not been successful. Although the conduct may not be technically against the law, courts consider sexual intercourse between teachers and students to be clearly "improper." *See Denton v. South Kitsap School District*, 519 P.2d 1080 (Wash. 1973). One commentator on this topic, concludes that "where the misconduct involves students, most courts will presume harm." Hooker, "Teacher Dismissal For Improper Touching or Sexual Contact with Students," 39 Educ. L. Rep. 945 (1987). *See also generally*, 78 A.L.R.3d 19 § 6.

Certainly, if the criminal code is violated, the behavior is considered improper or immoral. However, teacher dismissal statutes that permit removal for cause for "improper" or "immoral" conduct intend to cover not only criminal conduct but also a wider array of activities. *See, e.g., Strain v.*

Rapid City School Board, 447 N.W.2d 332 (S.D. 1989) (sexual touching of student on school premises); *Weissman v. Board of Education of Jefferson County School Dist.*, 190 Colo. 414, 547 P.2d 1267 (1976)(any sexually provocative or exploitive conduct with minor female students raises strong presumption of unfitness); *Dohanic v. Commonwealth of Pennsylvania Dep't of Education*, 533 A.2d 812 (Cmwlth. Ct. 1987) (dismissal for sending personal notes to female students); *Sauter v. Mount Vernon School Dist.*, 791 P.2d 549, 58 Wash. App. 121 (1990) (discharge for attempting to engage student in a sexual relationship); *Barcheski v. Board of Education of Grand Rapids Public Schools*, 412 N.W. 2d 296 (Ct. App. Mich. 1987) (discharge for driving intoxicated female student home alone; charge that teacher engaged in sexual intercourse with student was dropped).

Courts do not always agree with school boards as to what conduct rises to the level of improper or immoral behavior justifying dismissal. Consider the following speech: "I know you are here for me, and I know you are here to see me." A male teacher spoke these words while he blocked the door with his arm preventing a female student from departing. The student concluded that the words contained a sexual connotation. The board agreed and discharged the teacher. However, the Colorado Supreme Court held that as a matter of law the words did not "constitute substantial evidence of sexually provocative or exploitive conduct." *Madril v. School District No. 11*, 710 P.2d 1, 3 (Colo. App. 1985).

In another case a male teacher touched and tickled female students between their legs close to their genital area but without specific genital contact. The teacher also made comments containing sexual innuendos while engaging in this behavior. The Colorado Supreme Court concluded that the contact was not "immoral", characterizing it as good-natured horseplay. *Weissman v. Board of Education of Jefferson County*, 547 P.2d 1267 (Colo. 1976). The court instructed that the board must show how such horseplay constituted immorality before using the conduct as grounds for dismissal. *Id.* at 1270.

Nexus

Almost every jurisdiction that has considered the question of teacher dismissal has wrestled with what constitutes a "nexus" between the alleged misconduct and the teacher's ability to carry out his professional responsibilities effectively. One author has suggested,

> . . .that a school employee's adverse behavior must be overlooked unless that behavior interferes with the performance of the duties of the employee's office. Also, a school employee cannot be penalized by misbehavior unless a school board can prove that such misbehavior diminishes his/her ability to perform the job.

Nolte, "Establishing the Nexus: A School Board Primer," 38 Educ. L. Rep. 1 (1987).

A 1969 California decision, *Morrison v. State Board of Education*, 461 P.2d 375 (Cal. 1969), is often cited by other courts when discussing the issue of the sufficiency of proof regarding nexus. The California court noted as follows:

> We therefore, conclude that the Board of Education cannot abstractly characterize the conduct in this case as "immoral," "unprofessional," or "involving moral turpitude" within the meaning of Section 13202 of the Education Code unless that conduct indicates that the petitioner is unfit to teach. In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of

> the teacher involved or other teachers. These factors are relevant to the extent that they assist the board in determining a teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the board's standards.

Id. at 386-87. Accordingly, in any discharge action for conduct off school premises and not directly involving students, districts will have to show a nexus between the offensive conduct and the teachers' performance of their duties. *See, e.g., Lile v. Hancock Place School Dist.*, 701 S.W. 2d 500 (Mo. Ct. app. 1985) (discharge upheld where teacher was charged with sexual abuse of minor children in his household because children involved were of same age as his students and school community knew of charge); *Shipley v. Salem School Dist.*, 64 Or. App. 777, 669 P.2d 1172 (1983) (nexus to school performance inferred where teacher found liable in civil suit for sexual assault and battery of 12 year old child who lived in teacher's school district and was of the same age as teacher's students).

Proof of nexus can generally be classified as falling into one or more of four general categories.

- **Role Model**. Evidence indicates that teacher's conduct establishes an inappropriate role model for students who have or may learn of the incident.
- **Recurrence**. Objectionable behavior likely to recur.
- **Notoriety**. The teacher's conduct has incurred community notoriety, impacting upon the teacher's professional performance.
- **Nexus per se**.

• Role Model

Where conduct other than sexual abuse of children is at issue, the claim that a teacher's other sexual misconduct adversely affects his ability to serve as a role model assumes that teachers are supposed to be role models for students concerning sexual conduct. Such a proposition is not necessarily universally accepted. In cases where the role model issue has been raised as grounds for discharge, the conduct in question has been extreme. In *Grossman v. School District Township of Bernards,* 316 A.2d 39 (1976), the district cited the adverse effect of a teacher's sex change operation on that teacher's ability to serve as a role model. Expert testimony in the case turned on whether contact with the teacher would strengthen or confuse students in the development of their own sexual identities. The court cited possible emotional harm to students in upholding the discharge.

• Recurrence

Likelihood of recurrence is one of the elements set forth in *Morrison*. It may be helpful for districts to secure experts to testify that sexually aberrant behavior is not typically an isolated occurrence and that individuals who once commit certain sexual acts are likely to do so repeatedly. *See, e.g., Board of Education of Argo-Summit School Dist. No. 104 v. Hunt*, 138 Ill. App. 3d 947, 93 Ill. Dec. 580, 487 N.E.2d 24 (1985). The future proclivities of the individual are of paramount concern where they may affect the future security of students.

• Notoriety

Districts can rely upon notoriety to help support a decision to discharge when it can be shown that parents, students, faculty or the community at large has knowledge of the allegations or facts, and that the knowledge will impair future professional relations. Proof of notoriety can be established through newspaper or other media reporting of events. Notoriety need not be community-wide. It can also be established among just the students and parents in a given school. *Jefferson Union High School District v. Jones*, 23 Cal. App. 3d 94, 100 Cal. Rptr. 73 (1972).

Districts must ensure that their own actions do not result in an increase of notoriety and that they observe any legal or contractual restrictions on release of student and personnel information. For obvious reasons, potentially defamatory statements should be avoided. Teachers may attempt to defend against notoriety claims by presenting evidence that the notoriety problems were district induced. In one case, the teacher claimed that the notoriety resulted from extensive time delays or from school gossip from district officials. *Id.* at 99.

- **Nexus Per Se**

Courts have held that certain conduct constitutes grounds for discharge per se, and that a nexus need not be specifically shown. In *Denton v. South Kitsap School District*, the Washington Court of Appeals reasoned as follows:

> Mr. Denton relies heavily on the case of *Morrison v. State Board of Education*, 1 Cal.3d 214, 82 Cal. Rptr. 175, 461 P.2d 375 (1969), for the proposition that discharge of a teacher cannot be predicated upon sexual immorality absent a showing that the conduct redounds adversely upon the teacher's "fitness to teach."
>
> While the argument that "immorality" per se is not a ground for discharge without showing of adverse effect upon "fitness to teach" or upon the school has merit (indeed this is a fair inference from *Brown v. Gear, supra*), we decline to set such a requirement where the sexual misconduct complained of directly involves a teacher and a minor student. In our view, the school board may properly conclude in such a situation that the conduct is inherently harmful to the teacher-student relation, and thus to the school district.

516 P.2d at 1082.

The *Denton's* court distinction based on direct sexual involvement with students is supported by the results in other cases. In *Mott v. Endicott*, 713 P.2d 98 (1986), the court upheld the discharge of a band teacher for "lightly" striking three male students in the area of their genitals. The court sustained the discharge despite no finding of sexual motivation nor express proof of a nexus with teaching duties. The court noted "in some instances teachers misconduct can be so egregious that sufficient cause determination can be made as a matter of law." *Id.* at 101. In *Shipley v. Salem School District*, 669 P.2d 1172 (Or. 1983), although the court expressly found that nexus need not be separatelystated in the notice of dismissal, the courtdid say that "nexus may obviously be inferred," even though the conduct involved contacts off school property with a minor who was not a student.

CHILDREN AS WITNESSES

Credibility Issues

- **Competency**

The issue of competency to testify may arise where the child involved is very young or has a mental disability. Different approaches are used to establish competency; some jurisdictions presume competency unless proven otherwise; others have specific laws concerning child witnesses; and still others require a finding that the witness understands the difference between truth and falsehood. *See* National Legal Resource Center for Child Advocacy and Protection, *Protecting Child Victims/ Witnesses: Sample Laws and Materials* 43-46.

- **Uncorroborated Testimony**

Typically, cases of sexual misconduct involving teachers and students will only be adjudicated if a dispute of facts arises, with the student(s) alleging misconduct and the teacher denying it. The triers of fact often must conclude whether an alleged student victim is more believable than the teacher denying the conduct. In *Wissachickon School District v. McKowen*, 400 A.2d 899 (Pa. 1979), the court framed the dilemma as follows: "It is clear that only two individuals know what occurred on the dates in question and their testimony is in conflict. It is for the Board in weighing all the testimony to determine which version to accept. *Id.* at 901.

The teacher had urged that a higher standard than the substantial evidence rule be applied where the trier of fact's credibility determination between one student and a teacher determines the outcome of the case. The court, rejected the teacher's appeal on this basis, noting, "[i]f there ever is a reason for relying on the determination of a tribunal having an opportunity to observe the witness it is under these circumstances." *Id.*

- **False Allegations**

Because false allegations of child abuse can be devastating to the personal and professional life of the accused, it is imperative that school districts make concerted effort to discover any falsehood in a complainant's story at the earliest point possible in the district's investigation, thus avoiding unwarranted dismissal or disciplinary hearings or unexpected evidentiary challenges that undermine the credibility of an alleged victim's testimony. Thorough investigation may often reveal the reason for a false allegation — such as desire for retaliation against a teacher, misunderstanding or exaggeration of an innocent situation, stories planted by a third party, or succumbing to public hysteria — but a school district must be careful not to let its determination of the truth be unduly influenced by factors such as the complainant's promiscuous behavior, the popularity or longstanding personnel record of the accused, or the student's delay in coming forward. For information on the issue of false allegations, see U.S. Dep't of Health and Human Services, *False Allegations* (bibliography) (April 1992).

• Contaminated Testimony

Like the issue of false allegations, the possible challenge to a student's testimony based on "contamination" can be avoided by using proper investigatory procedures. Obviously, testimony by a child who has been asked leading or suggestive questions by a school investigator or who has otherwise been coached or coerced in giving her story may be challenged as "contaminated" and therefore either unworthy of credence or else inadmissible. Careful, neutral questioning by a *trained* investigator is absolutely essential to avoiding this problem at a later ad-judicatory proceeding.

Delayed Memory

According to one source, at least 19 states since 1989 have enacted legislation allowing people to sue for recovery of damages for injury suffered as a result of childhood sexual abuse remembered for the first time during adulthood. Bower, B. "Sudden Recall," *Science News*, Vol. 144, No. 12 at 184 (Sept. 18, 1993). Obviously, such laws may create difficult liability issues for schools if the alleged abuse occurred at the hands of a school employee. In addition to liability issues, schools may also be faced with making equally complicated employment decisions if the accused is still an employee of the district.

In *Fisher v. Independent School District No. 622*, 357 N.W.2d 152 (Minn. App. 1984), the Minnesota court sustained a discharge of a principal despite the fact that the sexual misconduct was alleged to have occurred 12 to 16 years earlier. The evidence consisted of a student's word against that of the principal with no corroborating evidence. Evidence was introduced from other sources to show that the events "could have taken place without notice."

The court in *Fisher* dealt with a challenge on the grounds that the conduct and evidence were too remote in time. The principal argued that remoteness resulted in deprivation of due process, loss of relevant evidence, and impeachment of witnesses' memories. The Minnesota court cited remoteness as one of the factors articulated by the California Supreme Court in *Morrison* to conclude that "in the terms employed in *Morrison*, the adverse effect upon students and the degree of that adverse effect easily outweighs the remoteness of the conduct charged." The court then quoted a lower Minnesota court in a similar case as follows: "By virtue of the nature of the offense — sexual intercourse with a minor student of the district—it may be considered doubtful whether such conduct could ever be too remote in time." *Id.* at 155.

In another recent decision, the Iowa Supreme Court interpreted discovery rules to allow a former student of the Iowa School for the Deaf to sue for damages based on alleged sexual abuse by a member of the professional staff seven years earlier. *Callahan v. State*, 464 N.W.2d 268 (Iowa 1990). The court accepted the effects of "post-traumatic stress disorder," quoting a Ohio State Law Journal article as follows:

> [t]he term "Post-Traumatic Stress Disorder" (PTSD) is used to describe the psychological impact of traumatic events on a person. The disorders resulting from these events may be either a combination of physical and mental disorders, or solely a residual mental incapacity continuing after a physical injury has healed. PTSD can exist even when a trauma victim has not suffered demon-

> strable physical injury. A sexually abused child who suffers from this disorder may exhibit symptoms of unnatural secrecy, feelings of helplessness or entrapment, delayed or conflicting disclosure, retraction, and various phobias. A practical consequence is that the child may repress or delay disclosing the sexual abuse until after the pertinent personal injury statute of limitations has run.
>
> The child's damaged psyche and weakened ability to perceive right and wrong hinders the child from taking self-protective measures. It is fundamental that in order for a person to take action for a wrong, that person must perceive it as a wrong. Even after she perceives the wrong, she [the sex abuse victim] must also distinguish what kind of wrong it is — a moral wrong, a social wrong, or a legal wrong — in order to take appropriate action. The sexually abused child's world is very often a confused one and thus she may be greatly disabled both in her ability to perceive wrongs and to take appropriate legal action. The people she normally should be able to trust for protection and moral guidance are often the ones hurting her.
>
> Comment, *Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation*, 50 Ohio St. L.J. 753, 756-57 (1989).

464 N.W.2d at 271-72.

Not all courts and commentators are as amenable as the Ohio court to the concept of post traumatic stress disorder or "child sexual abuse accommodation syndrome." (CSAAS). *See, e.g., People v. Beckley*, 434 Mich. 691, 456 N.W.2d 391 (1990) (barring expert testimony on CSAAS to account for victim's delay in making accusation). *See also* Comment, "The Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome as Indicia of Abuse: Aiding the Prosecution in Meeting its Burden of Proof," 16 Ohio N.U.L. Rev. 81 (1989).

Right of Confrontation v. Trauma to Child Witness

Courts have recognized that due process requires that a tenured employee is entitled to a meaningful opportunity to be heard before being deprived of his property interest in continued employment. This opportunity includes, among other things, the opportunity to confront and cross-examine available witnesses. *See, e.g., Deuel v. Arizona State School for the Deaf and Blind*, 799 P.2d 865, 868 (Ariz. App. 1990) (citing *Goldberg v. Kelly*, 397 U.S. 254 (1980)). *See also* Covert, S.E. "Due Process and Collective Bargaining Issues When School Employee Accused of Child Abuse," at pages [ ]. Conflicts may arise between this requirement and the desire to avoid additional emotional harm to a child caused by having to recount traumatic events in a hearing or trial in the presence of the alleged abuser.

One court called upon to judge the validity of using video testimony in a teacher dismissal hearing reasoned by analogy to a state statute permitting abused minors to testify by video in criminal proceedings that such testimony should only be allowed after a finding that "the witness would suffer severe emotional or mental distress if required to testify in open court." *In the Matter of Wolf*, 555 A.2d 722, 727 (N.J. Super. A.D. 1989) (citing N.J. Stat. Ann. § 2A:84A-32.4(b)). While recognizing that administrative hearings do not implicate the Sixth Amendment right to confrontation, the court also pointed to Supreme Court rulings in criminal child abuse cases involving screened or video testimony by child witnesses. *See Coy v. Iowa*, 487 U.S. 1012 (1988); *Maryland v. Craig*, 110 S.Ct. 3157 (1990). The court in *Wolf* also noted that where the defendant is physically separated from his attorney during the course of the closed circuit testimony, audio communication between the two must be provided in order to enable the accused to assist his attorney in effectively cross-examining the witness.

REMEDIATION

In general, if a teacher's misconduct can be corrected, an opportunity for remediation must be afforded prior to termination. In *Downie v. Independent School District No. 141,* 367 N.W.2d 913 (Minn. App. 1985), the court considered the remediation of sexual misconduct because the teacher termination statute (Minn. § 125.12(6) and (8)) distinguishes between grounds for immediate discharge and discharge subsequent to failed remediation.

The court set forth the following test for remediation:

> Several factors should be weighed when determining remediability; the prior record of the teacher, the severity of the conduct in light of the teacher's record; whether the conduct resulted in actual or threatened harm, either physical or psychological; and whether the conduct could have been corrected had the teacher been warned by superiors. Furthermore, school boards are not required to wait for harm to come to their students before discharging a teacher. The absence of harm is one of several factors to be considered in determining whether the conduct is remediable.

367 N.W.2d at 917. The court found "harm" to students and concluded no remediation was necessary. Interestingly, the court also concluded that boards can rely on the prospect of future "harm," and do not have to find actual harm to conclude that remediation is not warranted. The court cited prior decisions establishing a two-part test for determining whether certain conduct is irremediable:

(1) whether damage has been done to the students, faculty or school, and

(2) whether the conduct resulting in that damage could have been corrected had the teacher been warned.

Id. The court then modified the second part of this test as inapplicable to cases involving immorality. The court noted the district's allegation did not include actual sexual contact with students, but rather a variety of sexually explicit conversations with junior high school students which included vulgar and crude language.

Where teachers have sought remediation prior to discharge, courts have generally concluded that remediation is not required in cases involving immorality. For example in *Fadler v. Illinois State Board of Education,* 106 Ill. Dec. 840, 153 Ill. App. 3d 1024, 506 N.E.2d 640 (Ill. App. 5th Dist. 1987), an Illinois appeals court stated:

> Plaintiff's conduct has already caused a breach of trust in plaintiff and in the entire faculty and school system. The more appropriate focus is not whether the conduct itself could have been corrected by a warning but whether the effects of the conduct could have been corrected. . . A warning, even if effective in stopping plaintiff's conduct, would not be effective in correcting the psychological damage to the students or the damage to the reputation of the faculty, school district and plaintiff himself. We are not dealing here with simple deficiencies in teaching or differences in methods of punishment. . . Plaintiff's conduct has no legitimate basis in school policy or society. No purpose would be served by giving plaintiff a written warning. We conclude, therefore, plaintiff's conduct is irremediable. [citations omitted].

106 Ill. Dec. at 844. *See also Sauter v. Mount Vernon School District*, 791 P.2d 549, 58 Wash. App. 121 (1990); *Board of Education of Argo-Summit School District No. 104 v. Hunt*, 93 Ill. Dec. 580, 487 N.E.2d 24 (Ill. App. 1985).

COLLATERAL LIABILITY

Negligent retention suits have added a new twist to the problem of disciplining and discharging teachers for sexual misconduct. Despite the fact that remediation or progressive discipline has not been considered a prerequisite to termination of teachers for many forms of sexual misconduct, schools sometimes excuse or only mildly discipline the accused teachers. Usually, if the behavior continues or exacerbates, the district will seek to terminate. Evidence of a history of inappropriate behavior with students is both relevant to and supportive of termination. But, it may also provide a basis for victimized students to sue the district for damages for either negligent retention or negligent supervision. In *Doe v. Durtschi*, 716 P.2d 1238 (Idaho 1986), the Idaho Supreme Court recognized these claims as valid under the Idaho Tort Claims Act. The central fact question in such cases is whether the district knew or should have known that an employee was a threat to minor children.

In an unpublished Iowa case, the court dismissed the plaintiffs' case because they failed to establish that the district knew of the teacher's prior misconduct. *Bettis v. Pendergrass*, No. 84-0389 (Iowa 1990). Plaintiffs sought to show that the teacher received verbal warning from a school principal for snapping bra straps and being too close physically to female students when coaching. In response to these rumors and complaints, the school principal and school superintendent indicated to parents that absent a specific formal complaint by a student, nothing could be done. The principal "talked to" the teacher, but took no further action. Several years later the teacher was charged and convicted of child molestation involving a female student. The liability a district would incur where plaintiffs do show knowledge of prior sexual misconduct could be much different. If a district investigates allegations of misconduct, concludes that misconduct has occurred but is not sufficiently egregious to warrant discharge, it may be compounding its prob-lems should the teacher subsequently engage in more serious conduct.

For discussion of cases raising federal claims against schools for inadequate response to sexual misconduct by employees, see Gregory, G. "Child Abuse in Schools: Responsibility under Federal Law," at pages [ ].

CRIMINAL CHARGES

In some jurisdictions, the school district has the choice of deferring termination hearings until after the criminal trial when the grounds for termination and the criminal trial involve the same set of operative facts. Where the choice lies with the district, the pros and cons of the two options very much depend upon the particular facts of the case.

Dealing with a prosecuting attorney can be contentious, even for school district lawyers who arguably are on the same side. Some prosecutors jealously guard witnesses fearing that mishandling of a witness at a prior hearing might provide a basis for impeachment at the criminal trial. Witnesses often are reluctant to testify once, let alone twice.

Accused teachers may have one lawyer for the criminal case and a different one for the termination hearings. Typically, both of the teacher's lawyers prefer that the criminal trial conclude prior to the termination hearing. Teachers' counsel wish to avoid their clients' potential self incrimination in the termination hearing, providing the prosecutor either additional evidence or a basis upon which to impeach at subsequent criminal proceedings.

From the school district's point of view, the drawback to deferring the termination hearing involves more than just the teacher's pay status. (In Iowa teachers receive full pay until disposition of their termination hearing at the board level). When the criminal case is resolved after many months with a plea bargain or a murky outcome, proceeding on stale evidence can be difficult. The main advantage of deferring termination hearings is that when the criminal proceedings result in a guilty plea or a conviction, the teacher may resign or at least the termination becomes much easier to support. However, if the result is an acquittal, the district faces a dilemma. The criminal standard of "beyond a reasonable doubt" differs from the standard of "substantial" or "preponderance of the evidence," typically utilized in termination hearings. The evidence that can be admitted in a termination hearing is much broader. This means that districts can often sustain discharge in instances where a jury acquitted on the same set of operative facts. When challenged, courts have recognized the basic differences between the two proceedings and upheld the discharge. *See, e.g., Board of Education of El Monte School District v. Caldron*, 110 Cal. Rptr. 916, 35 Cal. App. 3d 490 (1973); *Madril v. School Dist. No. 11*, 710 P.2d 1 (Colo. App. 1985); *Board of Education of St. Charles Community United School Dist. v. Adelman*, 423 N.E.2d 254, 53 Ill. Dec. 62, 97 Ill. App. 3d 550 (1981).

CONFIDENTIAL SETTLEMENT AGREEMENTS BETWEEN SCHOOL DISTRICTS AND TEACHERS ACCUSED OF CHILD ABUSE: ISSUES OF LAW AND ETHICS*

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INTRODUCTION

When a school district accuses a teacher of abusing children, the grounds for dismissal are clear. Teachers who engage in sexual or physical abuse of children may be discharged immediately.[1] Statutes that require school districts to give the teacher warning or to place the teacher on a plan of improvement do not apply in child abuse situations.[2]

Nevertheless, school districts are often reluctant to move forward with formal dismissal proceedings against teachers accused of child abuse. It is not uncommon for such accusations to be resolved with a termination agreement, whereby dismissal charges are withdrawn and the teacher resigns.

From a school district's perspective, there are good reasons for allowing the accused teacher to resign rather than pressing forward with dismissal hearings. Sometimes the evidence is unclear, or there are mitigating circumstances. School districts are often reluctant to hold a dismissal hearing that will require child abuse victims to testify and perhaps suffer further trauma. Dismissal hearings can be expensive, and districts may prefer to invest their resources in education, rather than attorney fees and the administrative costs of dismissal proceedings. Finally school administrators and school boards are understandably reluctant to fire a teacher for child abuse, since to do so often effectively ends the teacher's professional career.

Likewise, even an innocent teacher may prefer to negotiate a settlement rather than defend himself against child abuse charges before an administrative tribunal. A teacher may believe that his standing in the community will never be restored, even if he is exonerated. Rather than put himself, and perhaps his family, through the anguish of a hearing, he may wish to start afresh in another school district. In addition, a teacher may be reluctant to stake his career on the abbreviated procedural protections that generally prevail in administrative proceedings.

A covenant of non-disclosure is often included in the settlement agreement between a school district and a teacher accused of sexual molestation or other child abuse. A school district may want to keep the matter secret to avoid alarming the public and perhaps to avoid embarrassing the alleged victims of abuse. For the teacher, confidentiality is essential. If the charges against him are publicized, his career may be irreparably harmed.

Despite good reasons for school districts to enter into confidential settlement agreements with teachers accused of child abuse, there are several legal impediments. First, open record statutes may override covenants of non-disclosure. Second, child abuse reporting laws prohibit school districts from independently resolving child abuse allegations; the accusations must be reported to the child welfare authorities or to the police. Third, confidential settlements between school districts and teachers accused of sexual molestation may violate public policy or specific statutory duties to report crimes. In addition to these legal impediments, confi-

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dential settlements are ethically objectionable if they assist known child abusers to obtain new employment in school districts or other settings where they will have the opportunity to injure more children.

OPEN RECORDS STATUTES

Most states have passed open meetings laws and open records statutes, requiring governmental agencies to conduct their business in public and to make their records available for inspection by private citizens and the press. Many courts have interpreted these statutes broadly in favor of the public's right to know. In recent years, courts have required school districts to disclose documents that many people once considered to be private. For example, in *Klein School District v. Mattox*, 830 F.2d 576 [42 Ed.Law Rep. 70] (5th Cir. 1987), *cert. denied*, 485 U.S. 1008, 108 S.Ct. 1473, 99 L.Ed.2d 702 [46 Ed. Law Rep. 27] (1988), the Fifth Circuit Court of Appeals ruled that a teacher's college transcript could be obtained from a school district by an interested citizen. Even if the teacher had a constitutionally recognized privacy right in her transcript, it was outweighed by the public's interest in evaluating the competency of teachers. *Id.* at 580. In *Hovet v. Hebron Public School District*, 419 N.W.2d 189 [44 Ed. Law Rep. 1325] (N.D. 1988), the North Dakota Supreme Court ruled that a teacher's personnel file was open to inspection under North Dakota's open records law.

Most school officials are aware of the open records laws in their states, and are quite willing to make records and documents available for public inspection. Nevertheless, they may not realize that, depending on the jurisdiction, settlement documents can be subject to open records laws, even if the parties to the settlement agree that the settlement is confidential.

For example, in *Anchorage School District v. Anchorage Daily News*, 779 P.2d 1191 [56 Ed. Law Rep. 315] (Alaska 1989), the Alaska Supreme Court ruled that the agreement to settle federal litigation between the Anchorage School District and an asbestos manufacturing company must be disclosed to the press, even though the parties had agreed that the settlement was confidential. The court recognized "that some litigants are unwilling to settle unless the terms of settlement remain confidential, and that a municipality's inability to assure confidentiality may, therefore, adversely affect its ability to negotiate a settlement." *Id.* at 1193. Nevertheless, the court determined that Alaska's open records law reflected a policy of open disclosure of public records, over the general policy of encouraging settlement. *Id.*

In *Guy Gannet Publishing Company v. University of Maine*, 555 A.2d 470 [52 Ed. Law Rep. 622] (Me.1989), the Supreme Judicial Court of Maine applied Maine's Freedom of Access Act to a confidential settlement agreement between the University of Maine and a former basketball coach. The court ruled that the agreement must be disclosed to the publishing company that requested it. Nevertheless, one section of the agreement containing medical information about the employee was protected from disclosure under a statutory exception to the Act.

In *Gannett*, the University of Maine argued unsuccessfully that the settlement agreement was privileged under Rule 408(a) of the Maine Rules of Evidence. That rule prohibited evidence of settlement discussions from being used to prove liability. The Maine court was unpersuaded, stating that the objective of the evidence rule was in no way compromised by the court's holding "that the public has a right to know the terms upon which a public employer has settled with a resigning contract employee." *Id.* at 473.

The Missouri Court of Appeals reached a similar result in *Librach v. Cooper*, 778 S.W.2d 351 [56 Ed. Law Rep. 1063] (Mo.Ct.App. 1989), a case involving the confidential settlement of a school superintendent's contract. The court ruled that the newspaper had the right to inspect the agreement under Missouri's Open Meetings and Records Act. The agreement was not exempted from disclosure by the statutory exception for personnel records, *id.* at 355, nor was it exempted under the exception for attorney-client communications. *Id.* at 354.

In *Booth Newspapers, Inc. v. Kalamazoo School District*, 181 Mich. App. 752, 450

N.W.2d 286 [58 Ed. Law Rep. 295] (1989), the Michigan Court of Appeals considered the application of Michigan's Freedom of Information Act to the settlement agreement between a school district and a teacher accused of sexual misconduct. A newspaper had requested documents from the Kalamazoo School District concerning the school district's tenure charges against the teacher and the settlement agreement between the school district and the teacher. This settlement agreement terminated the tenure proceedings without formal resolution of the charges. The trial court ruled that the information must be disclosed to the newspaper. In addition, the trial court ruled that a statutory privacy exception to the Michigan Freedom of Information Act required the identity of the teacher and the students involved in the allegations against the teacher be redacted from the requested documents. The school district appealed, joined by the Kalamazoo Education Association, acting on behalf of the teacher's interest.

In an opinion released in early 1990, the Michigan Court of Appeals acknowledged that disclosure of the teacher's identity would be highly intrusive of personal privacy. "It is hard to imagine anything more embarrassing than allegations pertaining to personal sexuality, particularly if the allegation is compounded by illicit and possibly criminal misconduct in sexual behavior." *Id.* 450 N.W.2d at 288.

Moreover, the court noted, not only were the charges embarrassing, they contained information that consisted of mere allegations that would never be adjudicated because of the parties' settlement.

> It goes without saying that the mere fact that an accusation has been made, particularly if it is ultimately found to be untrue, is capable of inflicting embarrassment, humiliation, and destruction of reputation of those named. Unlike cases where criminal charges against someone are pending, these allegations are subject to tenure proceedings kept out of the public eye. [Citation omitted]. There is perhaps great merit in disclosing action taken by a public body in addressing problems of this nature, but we see no justification for taking from those concerned their prerogative to keep their involvement in this matter secret.

Id.

Based on these considerations the Michigan Court of Appeals ruled that the agreement came within the privacy exemption of Michigan's Freedom of Information Act. The court then went on to weigh the teacher's privacy interest against the public's interest in learning of newsworthy events and the school district constituents' interest in the governance of the schools. The court concluded that the public's interest in the events did not outweigh the invasion of privacy that would follow disclosure of the teacher's identity.

Nevertheless, the Michigan Court of Appeals did not uphold the confidentiality of the settlement agreement. Instead, it upheld the trial court's decision to order the disclosure of the charges against the teacher and the settlement after the names of the teacher and students involved in the allegations were deleted. This result, the court ruled, achieved the proper balance between the teacher's privacy interest and the public's interest in gaining access to the information.

In *Booth Newspapers*, even the statutory privacy exemption in Michigan's Freedom of Information Act did not fully protect the confidential settlement agreement from disclosure. The case is in harmony with decisions around the country that construe state open records legislation broadly in favor of the public's right to know. If courts in other jurisdictions follow the reasoning of *Booth Newspapers*, a settlement agreement between a school district and a teacher accused of child abuse is available for public inspection. The best that can be achieved in maintaining the confidentiality of such an agreement is removal of the teacher's name from the document before it is released.

CHILD ABUSE REPORTING LAWS

A great deal has been written about the obligation of teachers and school officials to report child abuse, including sexual molestation, to state child welfare authorities or the police.[3] In general, most educators are aware of their reporting obligations and attempt to comply with the reporting laws.

Nevertheless, teachers and educators do not report all cases of suspected child abuse. Two commentators suggested that lack of reporting may be due to the following reasons:

> (a) a lack of recognition of the characteristics associated with child abuse, (b) teachers' lack of awareness of their legal responsibilities, (c) fear of repercussions from parents, (d) fear that a school's reputation or an educator's prestige would be impaired, (e) lack of knowledge regarding correct legal procedures for reporting such cases, or (f) perception that child abuse is a problem for the medical profession, the courts, or social welfare agencies.[4]

Child abuse reporting laws are not always clear about what must be reported and when suspected child abuse should be reported.[5] Educators may mistakenly believe that they are permitted to conduct an independent investigation of a teacher accused of child abuse before determining whether an accusation should be reported. They may even operate under the mistaken assumption that they are relieved of their obligation to report if they quietly obtain the teacher's resignation.

A school administrator who responds to an accusation of child abuse against a teacher by obtaining the teacher's resignation without reporting the matter to proper authorities, could face serious consequences. In most jurisdictions, it is a criminal offense for a person required by law to report suspected child abuse to fail to do so. States with criminal penalties for failing to report child abuse are listed in Myers, *A Survey of Child Abuse and Neglect Reporting Statues*, 10 J. JUV. LAW 1, 62-71 (1986) [*hereinafter* Myers]. In a few instances, professionals have actually been prosecuted based on charges that they failed to meet their statutory obligation to report. *See, e.g., State v. Grover*, 437 N.W.2d 60 (Minn. 1989) (school principal charged with failure to report child abuse). In some jurisdictions, a person who is required by law to report and fails to do so may be held liable in a civil suit. *Myers*, 10 J. JUV. LAW, at 8.

In some jurisdictions, a school administrator may be obligated to report suspected child abuse to a state educational agency as well as to the state child welfare agency. For example, Florida law requires school superintendents to report to the Department of Education all personnel who have been dismissed for immoral acts. FLA. STAT. § 231.28(5)(c) (West 1989). In California, a school district must report the names of persons suspended for charges of immoral conduct to the State Commission for Teacher Preparation and Licensing. CAL. EDUC. CODE § 44942(d) (West 1978 & Supp. 1990).

In Alaska, the Professional Teaching Practices Commission recently passed a regulation requiring school administrators to report all suspected sexual contact between teachers and students to the Commission. 4 ALASKA ADMIN. CODE § 12.092. The regulation was passed after a public controversy arose about a settlement agreement between the Anchorage School District and a teacher accused of having sexual relations with a seventeen-year-old female student. Under the terms of the agreement, the school district had promised not to report the allegations to the Professional Teaching Practices Commission if the teacher did not obtain another teaching position and if he allowed his teaching certificate to expire. Anchorage Daily News, Feb. 2, 1990 at D17; Anchorage Daily News, Feb. 26, 1990 at E3.

In summary, no settlement agreement between a school district and a teacher accused of child abuse can remain entirely confidential. The school district must report any incident of suspected child abuse to the agencies designated by state law. For a teacher, reporting laws may be a disincentive to settle, since no settlement with the school district will resolve the accusations against him. Other agencies may investigate the allegations and take independent action, regardless of any commitments made by a school district in a settlement agreement with the teacher.

PUBLIC POLICY

In addition to open record statutes and child abuse reporting laws, public policy may prevent school districts from reaching confidential settlement agreements with teachers accused of child abuse.

In *Bowman v. Parma Board of Education*, 44 Ohio App.3d 169, 542 N.E.2d 663, [55 Ed. Law Rep. 707] (1988), a teacher sued Parma City School District for breaching a covenant of non-disclosure in a termination agreement. The teacher had resigned after formal termination proceedings were commenced against him for inappropriate sexual contact with female students. The teacher then obtained employment with Lorain City School District. According to facts set forth in the court opinion, a Parma School Board member telephoned the school board president of the Lorain City School District and informed him that the teacher had been in the process of being terminated for "child molesting." *Id.*, 542 N.E.2d at 665. Later, the Lorain Board of Education commenced termination proceedings against the teacher for inappropriate sexual behavior with a student. The teacher entered into a settlement agreement with the Lorain Board and resigned. *Id.*, 542 N.E.2d at 664. The teacher then filed suit against the Parma School Board for violating the covenant of non-disclosure in its termination agreement with the teacher. After suit was filed, the teacher committed suicide.

The trial court granted the school board's motion for summary judgment, ruling that the covenant of non-disclosure was unenforceable. On appeal, the Ohio Court of Appeals upheld the trial court's ruling, holding that the non-disclosure clause was void as against public policy.

According to the court, the evidence submitted at the trial level indicated that the teacher was entirely unsuited for his profession. Much of the documented evidence of his status as a child molester was uncontradicted. For the court, this evidence disposed of the public policy issues. "The only possible conclusion that can be reached under the circumstances of the instant case is that the non-disclosure clause is void and unenforceable. . . ." *Id.*, 542 N.E.2d at 666. Thus no cause of action could be maintained for its breach.

> [The teacher's] decision to remain in the teaching profession undermines any validity the non-disclosure clause might otherwise have possessed. This court will not countenance an action for breach of such a clause upon such unchallenged facts as those in the instant case, for to do so would be to expose our most vulnerable citizens to a completely unacceptable risk of physical, mental and emotional harm.

Id., 542 N.E.2d at 667. In addition, the court ruled, to the extent the non-disclosure clause purported to suppress information regarding felonious conduct, the clause violated Ohio law. OHIO REV. CODE § 2921.22 (1987).

Bowman v. Parma Board of Education illustrates the willingness of many school districts to accept resignations from teachers accused of child abuse rather than to press forward with dismissal proceedings. In *Bowman*, two school boards entered into termination agreements with the same teacher after beginning dismissal proceedings against him for sexual misconduct.

ETHICAL ISSUES

Some courts recognize the tort of negligent hiring in law suits against school districts.[6] In these states, school districts have a legal duty to exercise reasonable care in investigating prospective employees regarding past sexual misconduct. School districts will have difficulty fulfilling this duty if former employers are prevented, by covenants of non-disclosure in termination agreements, from disclosing the details of a past employee's misbehavior.

In addition, laws requiring school districts to report sexual misconduct to educational agencies,[7] and statutes giving school districts access to criminal records of job applicants,[8] are designed to help identify child abusers and to prevent them from obtaining employment that would give them the opportunity to abuse more children. A settlement agreement that enables a known chid abuser to resign from a school district and to find new employment in another district is contrary to these legislative efforts to get child abusers out of the schools once and for all.

Most educators acknowledge an ethical obligation to protect children from harm. For example, the Executive Committee of the American Association of School Administrators approved a Statement of Ethics for Administrators, which includes this ethical standard: "The educational administrator makes the well-being of students the fundamental value of all decision making and action."[9] This standard can be interpreted to require educators not only to protect children in their own school districts from abuse, but also to pursue personnel policies that prevent former employees who are dangerous to children from gaining employment with other school districts. If this interpretation is valid, school administrators may have an ethical obligation not to enter into confidential termination agreements with known child abusers.

This is not to say that school districts should never enter into termination agreements with resigning teachers, even teachers who are accused of child abuse. There may be instances when the interests of the teacher, the alleged victims, and the school district will be best served by accepting an accused teacher's resignation rather than proceeding with a dismissal hearing. In limited circumstances, it may be appropriate for a school district to promise not to disclose the circumstances of termination, except to those authorities designated by state law. For example, a school district might be willing to keep the circumstances of a teacher's termination confidential if he voluntarily relinquishes his teacher certificate. Nevertheless, a school district should never agree to any settlement terms that might give a known child abuser an opportunity to injure children again.

CONCLUSION

Open records statutes, child abuse reporting laws, and public policy may impede a school district from entering into confidential termination agreements with teachers accused of child abuse. Thus, a school district should consider these points when drafting a settlement agreement with such a teacher.

- Every settlement agreement should be drafted as though it will be disclosed to the press, even if the teacher and the school district agree that the settlement will not be made public. Settlement terms may include certain incentives to encourage a teacher to resign. For example, the school district may pay a termination bonus or promise to provide health insurance for a certain period. The school administrator should consider what the public reaction would be if settlement terms become public knowledge.

- School district should not promise confidentiality to a resigning teacher, if there is any reasonable possibility that the terms of settlement will be disclosed under open records statutes. Secrecy may be a key element of settlement for a teacher, and it is not fair to the teacher for a school district to promise secrecy if the promise cannot be kept.

- Regardless of the way a school administrator chooses to respond to child abuse accusations against a teacher, the district must comply with the child abuse reporting laws. Suspected child abuse must be reported immediately to the appropriate child welfare agency. School officials should not conduct an internal investigation before reporting. Nor are school administrators relieved from reporting if the teacher resigns. If state law requires the school officials to report suspected abuse to a professional licensing board, this must be done as well.

- When negotiating a settlement agreement with a teacher accused of child abuse, a school adminis-

> trator should consider more than the school district's interest in ridding itself of a problem employee. A school administrator should ask whether the settlement agreement could assist an unsuitable teacher to obtain employment in another school district.

From the teacher's standpoint, settlement is less attractive if the circumstances of termination can be made public. Thus the legal impediments to confidential termination agreements may discourage settlements between school districts and teachers accused of child abuse.

If so, this is both a negative and a positive development. On the one hand, termination agreements are often a good way to resolve child abuse accusations when the facts are unclear. A carefully crafted termination agreement will allow a teacher to preserve his career and prevent the necessity of expensive, traumatic dismissal proceedings, which are often disruptive to the schools and damaging to students. On the other hand, school districts have sometimes used confidential termination agreements to sweep accusations of child abuse under the rug. Permitting a teacher, who is dangerous to children, to resign rather than be dismissed may give him the opportunity to work in another school district and to perhaps injure other children. School districts, along with child welfare authorities and professional licensing boards, have an obligation to remove child abusers from the schools. School districts should not enter into settlement agreements with teachers accused of child abuse, if the settlement impedes that obligation.

END NOTES

1. *See generally* Hooker, *Teacher Dismissal for Improper Touching or Sexual Contact with Students*, 39 Ed. Law Rep. 941, 952 (Aug. 20, 1987) ("Proof of a teacher's sexual acts with a student is uniformly held to be sufficient grounds for dismissal."); *see also* Winks, *Legal Implications of Sexual Contact Between Teacher and Student*, 11 J. OF LAW & EDUC. 437 (1982) (discussing cases involving sexual contact between teachers and students).

2. *See generally Bd. of Educ. of Argo-Summit School District v. Hunt*, 138 Ill.App.3d 947, 93 Ill.Dec. 580, 487 N.E.2d 24 [29 Ed. Law Rep. 690] (1985) (school district not required to warn teacher before dismissing for inappropriate touching of elementary school students); *Fadler v. Illinois State Bd. of Educ.*, 153 Ill.App.3d 1024, 106 Ill.Dec. 840, 506 N.E.2d 640 [38 Ed. Law Rep. 1245] (1987) (school district not required to warn teacher for conduct which could not be remedied by simple warning).

3. *See* Shoop & Firestone, *Mandatory Reporting of Suspected Child Abuse: Do Teachers Obey the Law*, 46 Ed. Law Rep. 1115 (Aug. 4, 1988) and the authorities cited therein.

4. *Id.* at 1117.

5. Nevertheless, efforts to overturn child abuse reporting statutes based on vagueness have failed. *See State v. Grover*, 437 N.W.2d 60 [52 Ed. Law Rep. 736] (Minn. 1989); *People v. Cavaiana*, 172 Mich. App. 706, 432 N.W.2d 409 (1988).

6. *See* Beezer, *School District Liability for Negligent Hiring and Retention of Unfit Employees*, 56 Ed. Law Rep. 1117 (Jan. 4, 1990); Howard, *Negligent Hiring and Employer Liability in the Selection of Employees*, 49 Ed. Law Rep. 1 (Nov. 24, 1988).

7. *See* FLA. STAT. §231.28(5)(c) (West 1989); CAL. EDUC. CODE § 44942(d); 4 ALASKA ADMIN. CODE § 12.092.

8. A list of state criminal history screening statutes is contained in Davidson, *Protection of Children Through Criminal History Record Screening*, 89 DICK. L. REV. 577-603 (1985).

9. The Statement of Ethics for School Administrators is contained in R. KIMBROUGH, ETHICS, A COURSE OF STUDY FOR EDUCATIONAL LEADERS 82 (1985).

LEGAL ISSUES FOR SCHOOLS ASSISTING ABUSE VICTIMS

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Abuse of students produces tragic challenges for public school districts, whether the abuse occurs in or out of the school setting. Not only do educators often have to help "pick up the pieces" in a student's shattered life, they also must deal with difficult and conflicting issues involving the child, the child's parents and, on occasions, their own employees.

This chapter surveys the legal considerations for school districts wishing to assist family members and students victimized by abuse within the family or at the hands of school employees.

INTRA-FAMILY ABUSE

Because of the privacy inherent in most family life, allegations of intra-family abuse can create enormous problems for school officials. The allegations may involve one or both parents, a pupil's siblings, or other relatives, and school officials have no way of knowing for sure who is involved or what actually occurred. In addition, reports of abuse by younger children can be problematic in the absence of any corroboration.

Take, for example, a recent case involving conflicting allegations of abuse of a child with disabilities. Mary (not her real name) was an eleven year old whose parents were separated and embroiled in a vituperative divorce. No custody order had been entered, and both parents remained interested in Mary's education. Mary had been evaluated and hospitalized in psychiatric centers half a dozen times in the past four years. She was suicidal, depressed, and socially inappropriate with her peers. Her mother was seeking a residential placement from the school division.

The parents had accused each other of drug and alcohol abuse in the home, and the mother also alleged sexual abuse by Mary's father. Each attributed Mary's emotional problems to misconduct by the other. The county's protective services unit concluded an investigation of the mother's complaint of paternal child abuse with an official finding of "reason to suspect," but no criminal charges were filed. The father vehemently denied the accusations, and no court or agency ever made a definitive determination of either parent's guilt or innocence.

Mary had been in and out of four schools during the past two years. She had been an average student with acceptable behavior at school, but her behavior at home became increasingly bizarre before her last hospitalization. The previous year, another school division had found Mary eligible for special education as an emotionally disturbed child, and she had received resource help while at school.

LEGAL ISSUES

Mary's case presented a host of difficult legal issues. Even with a stable home situation, Mary would have been a challenge to the most conscientious school personnel, but the overlay of a bitterly contested divorce and conflicting allegations of substance abuse and emotional problems made accurate understanding of the family situation extremely complex. Nonetheless, school officials were required by law to make appropriate decisions about Mary's education and how to deal with her parents.

Reporting

The threshold issue in child abuse cases is reporting to protective services agencies. School officials were spared the decision as to whether to report Mary's case, but this is often not the case. In fact, because of confidentiality requirements in many states, school officials cannot learn about other reports of abuse made by other parties about one of their students unless disclosure by the protective services agency to school officials becomes necessary during the course of its investigation.

All states have mandatory child abuse reporting requirements for school officials. Some states impose penalties for failure to report. *See, e.g.*, Va. Code § 63.1-248.3. It should be noted that many states immunize persons making child abuse reports unless reports are made maliciously or recklessly. *See, e.g.*, Va. Code § 63.1-248.5. For more information about child abuse reporting requirements, see Trickey, H. and Fossey, R. "School Employees Legal Obligation to Report Suspected Child Abuse," at page [ ].

Access to Records

Conflicts between parents about access to school records commonly arise in cases of alleged intra-family abuse. Often a parent will request a school to refuse disclosure of any information to anyone else, including a parent accused of abusive behavior. However, except where disclosure is legally barred, each parent or guardian has the unrestricted right to review and copy all of a child's records, regardless of the other parent's desires. *See* 34 C.F.R. § 99.4 (educational agency "shall give full rights under the [Family Educational Rights and Privacy] Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights"). While this requirement is clear, few parents understand or agree with it when abuse by another parent is alleged.

Educational Decisionmaking

Educational decision-making disputes may also create difficulties. In cases where joint custody has been granted or there have been no court proceedings, school officials often find parents battling over who can make educational decisions about their children. What, for example, is a school principal to do when each parent insists upon the exclusive right to decide about counseling or psychological services for an abused child? Some domestic relations courts now have mediation units to resolve these types of problems, and parents may be referred to them in hopes of obtaining a voluntary solution. In the absence of this, school officials can encourage parents to have the domestic relations court enter at least temporary orders on educational decision-making authority. School officials are neither qualified nor empowered to resolve these types of disputes.

Access to Child

A different problem arises when a parent objects to the other's plan to visit their children during the school day or to pick them up early or at the end of the day. Where children have allegedly been abused at home, this can be undesirable and potentially dangerous. Yet, at least in Virginia, for example, each parent generally has the right to see their children at school, and even to pick them up from school during the school day, unless there is a court order to the contrary.

One alternative is for school officials to deny access to both parents in cases where intra-family abuse is alleged until a court decides the issue, but this "solution" is not without problems. The parents may not be willing or financially able to take this ancillary issue to court, and courts do not have drive-through windows for instant service. What are school administrators to do with the child while waiting for a court order and what about the best interests of a child who desperately wants to be with a non-abusing parent? Decisions in such a situation should probably be left to the protective services agency if a child abuse complaint has been filed.

Of course, parents or guardians can demand access in other settings as well. What is the right of an abusing parent to see his or her child who has been placed in foster care as part of a county's interdepartmental placement? What is the right of abusing parents to visit their children at private placements selected by the school division? The answer to both questions is the same. In the absence of state law or a court order to the contrary, parents or legal guardians have the right to such visits. If school officials believe this poses a real threat to the child, they can refer the matter to protective services or file a "child in need of services" petition with the juvenile court. Once again, this is not an area where schools have the skill or the authority to unilaterally make this type of decision.

What is the right of police or protective services workers to interview or examine the child at school, particularly when they refuse to permit school officials to be present or to allow them to notify the parents? In Virginia, this is covered bý specific legislation permitting police and protective service workers access during the school day. The theory behind the statute is that this is often the only way to interview a victim without subjecting the child to retaliation while the investigation is going on. *See, e.g.*, Va. Code § 63.1-248.10. *See* Hungerford, N. "Investigating at Screening Sexual Misconduct Charges and Coordination with Other Agencies," at page [ ].

Other issues peculiar to victims of familial abuse which require additional attention can be grouped into three basic categories: intervention in substance abuse cases, satisfying special education requirements, and special privacy concerns, particularly when interdisciplinary teams attempt to intervene to assist the child.

Substance Abuse Intervention

When children come to school from homes where substance abuse is condoned or practiced, educators have difficult choices. Not only are there problems of confused values and inappropriate modeling by the parents, children in such settings may not fit the legal requirement of "neglected or abused" necessary for legal action against the parents. In Virginia, for example, the statutory definition requires that a child be in danger of physical or mental injury, be neglected or abandoned, be sexually abused, or be without parental care or guardianship. Va. Code § 63.1-248.2. Thus, the child's home situation may not rise to a level cognizable by the law unless there is persistent and gross substance abuse by a parent or caretaker.

In these cases, schools sometimes have a natural desire to intervene in some way to relieve the child's home situation. However, medicine's unfortunate experience with alcoholics and drug addicts proves that until abusers are willing to get help, external attempts to obtain it for them will not succeed. Therefore, school staff generally have to resist the temptation to do what they think is "best" and should act only as an information and referral resource if an abusing parent indicates a readiness for help.

The child's needs, however, may be directly addressed at school if the school knows of them. For example, if a student comes to a teacher or the guidance counselor seeking simple advice or a friendly ear, parental permission is not required for employees to give either one. However, the school must consider whether it has an obligation to inform parents of their child's request for assistance on such a serious matter. This determination should be driven by such factors as the child's age, the seriousness of the child's concerns, the potential for retaliation by the parent, and the type of further services that may be required. Furthermore, a school which receives federal funds must consider whether the type of service provided to the student requires parental consent under the Hatch Amendment which prohibits a school district from subjecting a student without prior consent to psychiatric or psychological examination, testing or treatment the primary purpose of which is to reveal, among other things, psychological problems or sex behavior or attitudes. 20 U.S.C. § 1232h.

Formal or ongoing efforts, such as support groups which arguably provide group counseling, may also require parental consent under state law because of their nature or duration. The school must also consider whether it has an obligation to advise law enforcement authorities if children tell them of criminal activities by their parents. This consideration is complicated by many children's request that their information be kept confidential. Guidance counselors, in particular, are often reluctant to disclose information gained in the counseling relationship without the child's permission.

Special Education

Where a student has serious problems because of any type of abuse and ongoing help is needed, special education issues must be considered. For example, a long history of intra-family abuse might trigger a "serious emotional disturbance" within the meaning of 34 C.F.R. §300.7(b)(9). Therefore, educators should be vigilant in considering special education needs when they learn of family abuse situations.

Everything from failing to see emotional difficulties caused by abuse as potential special education matters or to obtain consent for evaluations from embarrassed or hostile parents to securing parents' participation in the development of individual education programs can be procedural stumbling blocks for schools. The cardinal rule is that all children with disabilities have the right to an appropriate education, and it is the school district's responsibility to ensure that all procedural safeguards are provided. Indeed, some courts have held that procedural failures, standing alone, are sufficient to deny a free appropriate public education to a disabled child. *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985).

Therefore, school officials may not neglect to refer a troubled child for special education evaluation because the child's problems are due to a "family situation." Children must be referred and evaluated for special education if school officials have reason to suspect a handicapping condition. Similarly, if a child is referred for evaluation because of acting out at school or other indications of emotional disturbance and school staff members have reason to believe that child abuse is involved, they are nonetheless required to seek permission for the evaluation from the parents unless a court has terminated or restricted a parent's authority. Similarly, if a child is found eligible for special education, the school must work with the parents to develop an appropriate individual education plan and placement for the child.

All this is easier said than done. When school officials have reported or assisted in discovering intra-family abuse, the guilty parent(s) are rarely inclined to support or cooperate with the school. Not only does this make the process of serving the disabled child harder, parental opposition may also undermine an otherwise appropriate placement. Indeed, a 1991 decision of the Seventh Circuit specifically concluded that "it is permissible to consider parental hostility to an IEP as part of the prospective evaluation required by the EHA of the placement's expected educational benefits." *Board of Education of Community Consolidated School District No. 21 v. Illinois State Board of Education*, 938 F.2d 712 (7th Cir. 1991). In that case, the court upheld a more restrictive environment in the face of intense parental opposition to the proposed public day school placement.

The best practice is for school officials to observe all procedural requirements in child abuse cases. If necessary, schools must also initiate reverse due process to secure an appropriate education for a child in the face of parental opposition. School officials simply may not accept a parent's opposition to a special education program if the program is necessary for the child to receive educational benefit.

Privacy Concerns

A special issue is raised in states which use multi-disciplinary groups to coordinate services from various agencies for a child. For example, Mary's case was of concern to social services, the mental health department, and the school system because each had responsibility for different areas of Mary's life. In Virginia, interagency cooperation is now mandated in an effort to provide a seamless web of services to children in need. *See* Gittins, N. "Responding to Child Abuse in Schools: Issues in Interagency Cooperation," at pages [ ] for discussion of other cooperation statutes. Thus, social services, the mental health department, and the school system worked together to coordinate Mary's counseling, education and living arrangements because of the precarious nature of her home situation.

In order for the agencies to share confidential information with each other, parents are required to sign releases of information. See Appendix [ ] at page [ ]. In Mary's case, this was not an issue because Mary's mother was requesting a residential placement from the school division which advised her that partial funding might come from another agency. However, in cases where the parents are at odds with all government agencies, the agencies might be unable to obtain consent to share information.

There is another resource which implicates privacy issues. Some states, including Virginia, have central registries for the maintenance of all substantiated reports of child abuse in the state. The purpose is to prevent the employment of child abusers in positions involving contact with children and to permit tracking of parents who move from locality to locality and continue their abuse. In Virginia, the registry records data in the name of the abusing caretaker and maintains records of founded and "reason to suspect" cases for up to 18 years depending upon the nature of the abuse and the degree of risk to children. Central registries are not open to the public, but disclosure can be made under state guidelines. In Virginia, disclosure is permitted to local social service departments which are investigating complaints and to persons who have written consent for disclosure from the subject of the report. Typically, the latter situation involves a registry search for an employer during the application process for a child care or school position.

VICTIMS OF ABUSE BY SCHOOL EMPLOYEES

Allegations of abuse by school employees raise some of the same issues outlined above as well as others that require special attention. For example, the previous discussion of protective services reporting obligations, interviews by police and protective services workers, potential special education issues, and privacy concerns generally applies with equal force when school employees are the alleged abusers. But school administrators must also consider questions about possible contact between the victim and the alleged abuser and compensation for private services such as counseling to the victim.

While there is no ironclad rule that a student victim must be protected from further contact with a school employee accused of abusing the pupil, such a result is generally preferable whether the allegations of abuse turn out to be true or false.

If the allegations are true and anything more than isolated, non-egregious misconduct is involved, the employee should probably be dismissed, if for no other reason than to insure that the misconduct does not recur. *See, e.g.*, Mawdsley and Hampton, *Sexual Misconduct by School Employees Involving Students*, 73 Ed. Law Rep. 883 (June 18, 1992) which reported that all cases involving sexual misconduct with students reported since 1987 have upheld the employee's dismissal. Indeed, failure to act in the face of complaints of abusive behavior may be deemed to be deliberate indifference to the misconduct which renders the school division liable for damages. *See* Valente, *Liability for Teacher's Sexual Misconduct with Students — Closing and Opening Vistas*, 74 Ed. Law Rep. 1021 (July 30, 1992); Valente, *School District and Official Liability for Teacher Sexual Abuse of Students Under 42 U.S.C. §1983*, 57 Ed. Law Rep. 645 (Feb. 15, 1990). *See also* Regotti, *Negligent Hiring and Retaining of Sexually Abusive Teachers*, 73 Ed. Law Rep. 333 (May 21, 1992). On the other hand, if the misconduct was relatively minor such as an isolated, off-color remark or if the school district concludes an allegation of abuse is untrue, the question of a transfer becomes relevant. An employee transfer should not be considered when school officials believe the employee is guilty of serious abusive conduct. *See, e.g., Doe v. Durtschi*, 716 P.2d 1238 (Idaho, 1986), Anno. 60 A.L.R.4th 260. If either the student or the employee requests a transfer, the request should be probably be accepted with alacrity.

However, if neither the student nor the employee wishes to move, the school district faces some hard choices, especially if the employee is a teacher who is popular and performs important functions like coaching. One choice is no transfer, a risky proposition that should only be considered if both the student and the employee feel they can peacefully co-exist at the same location. Another choice is transferring the student if the student has clearly fabricated a claim of abuse on the theory that the employee should not be punished for the student's false accusations. Finally, the district can transfer the employee depending upon the circumstances. Whatever the decision, it should be made on a case-by-case basis taking all relevant factors into account.

Another issue that sometimes arises when a school employee has abused a pupil is compensation, particularly for privately-incurred expenses such as counseling. Sometimes an employee will volunteer or "agree" under pressure to pay a victim's out-of-pocket expenses in exchange for a release of all liability. However, deep-pocket school districts are the usual recipient of compensation requests, especially when there is a desire for continuing services by the student's family.

Under most states' laws, school boards are not liable for damages caused by the illegal acts of their employees if they did not know of or approve of them. Under federal law, this is not so clear. In a recent decision by the Fifth Circuit Court of Appeals, the court held that a school district will not be liable for a student's injuries under 42 U.S.C. § 1983 unless there was deliberate indifference to the student's constitutional right to bodily integrity. *Gonzalez v. Ysleta Independent School Dist.*, 996 F.2d 745 (5th Cir. 1993). *Gonzalez* raised the issue of a school district's liability for alleged violation of the constitutional right to bodily integrity of a child molested by a school employee who had been transferred to the child's school after he had been accused of sexual misconduct with students at another of the district's schools. The court viewed the transfer decision to be negligent and contrary to the district's own policy for handling sexual abuse cases but did not consider it to be deliberate indifference.

The U.S. Supreme Court has also held that school districts can be liable under Title IX of the Education Amendments of 1972 for intentional sexual discrimination. *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992). Title IX has been found to extend to claims of hostile environment sexual harassment. In *Patricia H v. Berkeley Unified School District*, 830 F. Supp. 1288 (N.D. Cal. 1993), the court found that two students who were allegedly sexually molested off school premises by a teacher stated a claim under Title IX based on the district's creation of a hostile environment by failing to remove the teacher from the school that the girls attended or would have attended but for the teacher's presence. The teacher had been temporarily suspended but no other steps were taken except to suggest to the girls' parent that they be moved out of the district. The court said whether the teacher's presence created a hostile environment was an issue for the jury. This case and others suggest that the exact parameters of possible federal liability for abuse by school employees are a work in progress. *See* Gregory, G. "Child Abuse in Schools: Responsibility Under Federal Law," at pages [ ].

CONCLUSION

School officials cannot escape the effects of abuse on their students. It affects children and adults alike, and educators must perform their duties with an eye to good practice and their legal responsibilities. In the end, school officials must sometimes live with situations which they dislike but cannot control.

IS SEXUAL ABUSE COVERED BY SCHOOL INSURANCE POLICIES?

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INTRODUCTION

In the past few years, the number of sexual molestation claims appearing in the courts has increased dramatically. The victims in these cases understandably seek compensation to cover the costs of the medical and psychological treatments required to remedy the oftentimes debilitating consequences of a molestation. Many such claims are being brought against teachers, counselors, other school employees and school districts.

When confronted with a molestation claim, an insured defendant should try to seek insurance coverage. Plaintiffs attorneys also target the deep pockets of the insurance companies when pursuing redress on behalf of a molestation victim. These requests for coverage have yielded a substantial body of case law delimiting the liability of insurers in molestation cases.

Although many courts deny coverage for molestations, there is some divergence in the bases for the decisions. Furthermore, some courts have found a duty to defend and/or indemnify an insured in a molestation case. This article presents a survey of the central issues litigated in this area, addresses the prevailing conflicts, and concludes with a discussion of emerging trends. Because there are few cases in this area which deal with school districts specifically, this article will look at the law in general.

Unless otherwise indicated, the term "coverage" herein encompasses the duty to defend and indemnify. The term "molestation" refers to all sexual misconduct, e.g., rape, incest, fondling, copulation, etc., in all contexts, e.g., adult vis-a-vis minor, minor vis-a-vis minor, and adult vis-a-vis adult. Where the nature of the act or the parties is relevant to a court's decision, specifics are included.

ACTIONS THAT INVOKE COVERAGE ISSUES

In most molestation cases, the insured seeks coverage after a plaintiff files suit. The legal theory pursued depends on who is the plaintiff and who is the defendant.

The Victim as Plaintiff

The most likely plaintiff is the molestation victim. This plaintiff can assert numerous claims arising from a single incident or repeated molestations. Victims usually assert claims based on intentional tort theories. However, depending on the status of the defendant and the jurisdiction, some victims can assert claims based on negligence.

- **Victim's Claims Against the Molester**

Intentional torts are the most common types of actions brought by victims against the molester. Most of the time, insurance policies will not provide coverage for intentional torts.

Some jurisdictions recognize the tort of negligent infliction of emotional distress. *See generally* W. Prosser and W. Keeton, *The Law of Torts*, § 54 (5th ed. 1984). In these jurisdictions, the direct victim of a tort may be able to recover for the psychological harm which was a reasonably foreseeable result of the originally tortious conduct. *Id.* Therefore, if a molester commits a battery, the victim seeks to recover for the reasonably foreseeable psychological harm that battery caused.

Victims may assert other claims based on negligence theories. If the insured was responsible for the victim's care and safety, the victim may allege that the insured negligently breached this duty by allowing himself to molest the victim. This situation can arise with school teachers and counselors who have custody of school children. In other cases, a victim may claim that the molestation itself was negligent, or that the molester negligently placed himself in a situation which permitted the molestation to occur. In these cases, the courts routinely hold that the injury complained of resulted from the molestation, which can never be a negligent act, not the insured's antecedent negligence. The insured's negligence was a but-for cause, but not the proximate cause of the victim's injury. Therefore, the courts treat these negligence claims as disguised intentional tort claims. *See State Mutual Ins. Co. v. Russell*, 462 N.W.2d 785, 785 (Mich. App. 1990) (allegations of negligence were a transparent attempt to "trigger insurance coverage by characterizing intentionally tortious conduct as negligent activity"); *State Farm Fire & Cas. v. van Gorder*, 455 N.W.2d 543, 546 (Neb. 1990) (regardless of the label attached by the plaintiff, the insured's sexually abusive acts were intentional as a matter of law); *New Hampshire Ins. Group v. Strecker*, 798 P.2d 130, 132 (Mont. 1990) ("[c]overage is based upon the acts giving rise to the claims, not necessarily to the language of the complaint"); *New York Underwriters Ins. Co. v. Doty*, 794 P.2d 521, 523 (Wash. App. 1990) (carefully crafted complaint never used the terms assault, battery, or false imprisonment, but "nevertheless asserted only intentional torts."); *James M. v. Sebesten*, 270 Cal. Rptr. 99, 109 (Cal. App. 4 Dist.), *rev. granted*, 272 Cal. Rptr. 291 (1990) ("regardless of what legal theories of civil liability are creatively pleaded * * * [t]he focus of the inquiry is on the acts themselves").

In the school setting, the possibility also exists for a molested child to pursue constitutional claims against the school district and its employees. 42 U.S.C. § 1983 is a purely remedial federal statute which provides a civil cause of action when a person's otherwise defined federal civil rights are breached. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). The initial inquiry in any section 1983 action is whether the two essential elements of a section 1983 claim are present: first, whether the conduct complained of was committed by a person acting under color of state law; and second, whether that conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). It should be emphasized that deprivation of a right secured by the Federal Constitution or laws of the United States is a prerequisite to recovery under section 1983. *Martinez v. California*, 444 U.S. 277, 284 (1980).

Merely negligent conduct will not create section 1983 liability. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). Instead, a claimant must establish that the school district or its officials were deliberately indifferent or grossly negligent in regard to any alleged constitutional violation.

In a section 1983 case, a plaintiff may allege that the school district and/or its officials fostered a policy or custom of reckless indifference or active concealment in regard to known or suspected sexual abuse of students. Under section 1983, government officials may be held liable for the failure to do what is required, as well as for overt activity which is unlawful and harmful. *Estelle v. Gamble*, 429 U.S. 97 (1976). The victim usually asserts a substantive due process right to be free from intrusions upon personal privacy and bodily integrity, which some courts have recently held to include protection from sexual abuse under certain circumstances. *See* Gregory, G. "Child Abuse in Schools: Responsibility Under Federal Law," at pages [ ] for a detailed discussion of section 1983 cases involving child molestation.

- **Victim's Claims Against Third Parties**

When opportunity permits, victims also file suits against third parties who may, in some way, be responsible for the molester's conduct. Frequent targets of these attacks include: parents, when the molester is another student; and school districts, when the molestation occurs on the school premises, at a school function or while the molester is under the school district's control. The claim may be based on a theory of *respondeat superior* but is more often brought as a negligent hiring or supervision action or a section 1983 claim as outlined above. Co-workers or administrators might also be sued if they were in a position to supervise or control the molester and/or failed to report prior suspicions or complaints of abuse.

Negligent supervision is the most frequent action brought against school districts. Negligent supervision could involve failure to supervise the molester or failure to guard and protect the victim. In either case, the victim alleges that the insured's negligence permitted the molester to operate. *See American States Ins. Co. v. Borbor*, 826 F.2d 888 (9th Cir. 1987) (partner could be liable for negligent supervision of molester). A third party might also be negligent in failing to investigate the molester's suspicious conduct. *Id.* at 892. Negligent hiring and retention claims against the molester's employer are also common. *See Horace Mann Ins. Co. v. Ind. Sch. Dist*, 355 N.W.2d 413, 420 (Minn. 1984). In *Horace*, a school counselor was sued for sexual abuse of a student. The complaint alleged strict liability and assault and battery against the counselor and a claim against the school district for negligence in hiring and retaining the counselor. The court found a duty to defend the employee but not to indemnify him where he was "guilty of malfeasance or willful or wanton neglect of duty."

Third Party Plaintiffs

Parents of molested minors frequently sue the molester for damages they sustain in their own right. A parent may try to sue for intentional infliction of emotional distress. However, this claim is not actionable unless the molester acted for the purpose of distressing the parent or with knowledge that such distress is substantially certain to occur. *See generally* W. Prosser and W. Keeton, *The Law of Torts*, § 12 (5th ed. 1984).

Parents may also claim negligent infliction of emotional distress. In those jurisdictions which recognize this tort, a parent may be able to recover if the molester caused the parents' distress by breaching a recognized duty owed to the parent. *See Marlene F. v. Psychiatric Med. Clinic*, 257 Cal. Rptr. 98 (Cal. 1989).

A parent may also sue for fraud if the molester obtained access to the victim by means of a false promise made to the parent. However, as will be discussed below, fraud is an intentional tort which is excluded under most policies.

Finally, parents may also bring an action for loss of the child's companionship and service. *See Worcester Ins. v. Fells Acres Day School*, 558 N.E.2d 958 (Mass. 1990). Courts sometimes incorrectly refer to this action as "loss of consortium".

COVERAGE ISSUES UNDER COMPREHENSIVE GENERAL LIABILITY POLICIES

The first inquiry is whether there actually is insurance coverage for the damages sought. Generally, under a comprehensive general liability (CGL) policy, coverage is provided for claims involving bodily injury or property damage. Most CGL policies also have endorsements covering personal injury which might trigger coverage.

Coverage for Bodily Injury

An insured trying to establish coverage for a molestation claim must first convince the insurer that the victim suffered bodily injury. The typical liability policy covers "all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury." The policy often defines "bodily injury" as "bodily injury, sickness or disease."

- **Psychic Injury as Bodily Injury**

Most courts hold that "bodily injury" includes "physical injury to the body and does not include claims for purely nonphysical or emotional harm." *American & For. Ins. v. Church Sch., Diocese of Va.*, 645 F. Supp. 628, 632 (E.D. Va. 1986). This interpretation usually excludes coverage for a victim's psychological trauma resulting from a non-violent molestation. *Id.* (term "bodily injury" does not cover a claim alleging purely emotional injury). Since many molestations of minors are non-violent, insurers frequently reject a tender of defense based on the absence of a bodily injury. However, some courts have carved out an exception to this rule.

Some courts hold that if an emotional injury results from a physical contact, the consequent psychological harm is included within the definition of "bodily injury," even if the physical contact itself was not harmful. *Allstate Ins. Co. v. McCranie*, 716 F. Supp. 1440, 1443 (S.D. Fla. 1989), *aff'd*, 904 F.2d 713 (11th Cir. 1990) (sexual abuse entailed physical contact which resulted in emotional injury); *NPS Corp. v. Insurance Co. of North America*, 517 A.2d 1211, 1214 (N.J. Super. A.D. 1986) (emotional injury resulting from offensive sexual touching is a bodily injury); *County of Chemung v. Hartford Cas. Ins. Co.*, 496 N.Y.S.2d 933, 935 (Sup. 1985) (bodily injury requires a physical event but not a physical "sequela").

Although the courts are still split on the issue of whether emotional harm is a bodily injury, the trend in molestation coverage cases is toward including emotional injury within the definition of bodily injury, especially when there has been some physical contact. This is consistent with the general trend in tort law jurisprudence to protect psychic, as well as physical integrity.

• Loss of Consortium as Bodily Injury

Some newer insurance policies expand the definition of bodily injury to include loss of care and services. Under this definition, those closely related to the molestation victim, *e.g.*, parents, spouse or offspring, may incur a covered bodily injury when they lose the victim's care or services. Plaintiffs present these claims by way of loss of consortium actions. The courts that have addressed the issue uniformly conclude that a person who suffers a loss of consortium incurs a distinct bodily injury under the expanded definition of that term. *Worcester Ins. v. Fells Acres Day School*, 558 N.E.2d 958 (Mass. 1990); *Allstate Ins. Co. v. Handegard*, 688 P.2d 1387 (Or. App. 1984), *review denied*, 695 P.2d 1371 (Or. 1985).

Coverage for Personal Injury

A CGL policy may include a personal injury endorsement which covers injury arising out of publication or utterance in violation of an individual's right of privacy or defamatory, slanderous, libelous or disparaging statements. No coverage will be available under this provision unless one of these enumerated torts is pled. *See Aetna Casualty & Surety Co. v. First Sec. Bank of Bozeman*, 662 F.Supp. 1126, 1132 (D. Mont. 1987) (no coverage under personal injury provision where plaintiff failed to allege defamation). Also, coverage is usually declined unless there is an allegation that a false statement was made. *American & For. Ins. v. Church Sch.. Diocese of Va.*, 645 F. Supp. 628, 633 (E.D. Va. 1986) (allegation of false statement is an essential element of torts of this nature). A personal injury endorsement may also cover false arrest and false detention claims. Since molestations frequently involve a detention against the victim's will, coverage for a molestation claim may be triggered under a personal injury endorsement.

The Necessity of an Occurrence

Even if the molestation-related claim involves a covered bodily or personal injury, coverage under a CGL policy is still not available unless the injury arose from an "occurrence." Older CGL policies defined "occurrence" as "an accident." If the policy did not define "accident," a court would typically define it along the lines of "an undesigned contingency, . . . a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Vermont Mut. Ins. Co. v. Malcolm*, 517 A.2d 800, 802 (N.H. 1986) (*quoting Guerdon Industries Inc. v. Fidelity & Cas. Co. of New York*, 123 N.W.2d 143, 147 (Mich. 1963)). *See also Finley v. Prudential Ins.*

Co., 388 P.2d 21, 26 (Or. 1963) (the word "accident" denotes "an incident or occurrence that happened by chance, without design and contrary to intention and expectation").

Obviously, when a molester intends his action, the molestation is not an accident and coverage is precluded. Accordingly, the following courts recognized the rule that there could be no coverage where an insured molester acted intentionally: *American & For. Ins. v. Church Sch., Diocese of Va.*, 645 F. Supp. 628, 633 (E.D. Va. 1986) (intentional torts of assault and battery are not occurrences); *Rodriguez v. Williams*, 729 P.2d 627, 629 (Wash. 1986) (were this an accidental occurrence policy, coverage would be excluded "because the act of committing incest could not be described as an accidental occurrence"); *Allstate Ins. Co. v. Talbot*, 690 F.Supp. 886, 889 (N.D. Cal. 1988) (mental incapacity could prevent defendant from acting intentionally, conduct was not accidental), *see also Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273, 280 (Cal. App. 5 Dist. 1989) (insured's act of sexual molestation was not accidental). *Accord Morton v. Safeco Ins. Co.*, 905 F.2d 1208, 1209 (9th Cir. 1990); *McCullough v. Central Florida YMCA*, 523 So.2d 1208 (Fla. App. 5 Dist. (1988) (regardless of the molester's subjective intent child molestation is of a criminal character and is not an accident); *Insurance Co. of North America v. Querns*, 562 So.2d 365 (Fla. App. 2 Dist. 1990) (intentional acts are not accidents).

Newer policies contain an occurrence provision that provides coverage for "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *New Hampshire Ins. Group v. Strecker*, 798 P.2d 130, 131 (Mont. 1990). In *Strecker*, the court held that the act which causes the damage must be accidental *and* the damage itself must be "unintentional" in order for there to be a covered occurrence. Therefore, if the molester intended either the harm or the harmful act, there is no coverage.

The majority of courts interpret the newer "occurrence" clause as requiring only that the harm be unintended. Accordingly, if a molester intends the act of molestation but did not intend to harm the victim, the victim's harm was accidental from the standpoint of the insured. *See Public Service Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810, 814 (N.Y. 1981) ("one whose intentional act causes an unintended injury may be * * * indemnified"); *Frankenmuth Mut. Ins. Co. v. Kompus*, 354 N.W.2d 303, 309-310 (Mich. App. 1984) (no accident where acts were intentional and injuries were expected from the standpoint of the insured); *Vermont Mut. Ins. Co. v. Malcolm*, 517 A.2d 800, 802 (N.H. 1986) (accident if result was unintended). *Accord Atlantic Employers v. Tots & Toddlers*, 571 A.2d 300 (N.J. Super. A.D. 1990). However, as will be discussed below, most courts are unwilling to extend coverage this far.

EXCLUSIONS UNDER COMPREHENSIVE GENERAL LIABILITY POLICIES

In molestation cases where a bodily or personal injury results from an occurrence, coverage may still be denied under an appropriate exclusion. The exclusion CGL insurers most often invoke in these cases is the intentional act exclusion.

In the following cases, the courts either applied an express intentional act exclusion, or an "occurrence" provision which contained the same exclusionary language. For convenience, the exclusionary language is referred to throughout as an "intentional act exclusion" even though the exclusionary language may have been found within an "occurrence" provision.

The Intentional Act Exclusion As Applied To the Molester

The standard intentional act exclusion precludes coverage for bodily injury or property damage either expected or intended by the insured. Generally, an intent to harm is a prerequisite to the application of an intentional act exclusion. *Butler v. Behaeghe*, 548 P.2d 934, 939 (Colo. App. 1976) (coverage excluded where evidence showed insured intended to harm battery victim). However, the courts are split on the type of intent required to invoke this exclusion.

- **Tests for Intent Defined**

(a) Objective Test.

A minority of jurisdictions apply an objective test of intent. A person intends an injury if the type of harm the victim suffered was the natural and probable consequence of the insured's intentional act. *See generally*, Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R. 4th 957 § 5 (1984). In these jurisdictions, the intentional act exclusion should apply to most claims of molestation because the harm suffered by the victim, psychic injury, is the natural and probable consequence of a molestation. *See CNA Ins. Co. v. McGinnis*, 666 S.W.2d 689, 691 (Ark. 1984) ("[t]he test is what a plain ordinary person would expect and intend to result from a mature man's deliberate debauching of his . . . stepdaughter . . . ").

(b) Subjective Test.

The majority of jurisdictions apply a subjective test for intent. Under this approach, the intentional act exclusion will not apply unless the insured subjectively intends to harm the victim. However, many courts presume an intent to harm to get around this requirement.

Adults who molest minors rarely "intend" to harm the victim. The adult may have been intoxicated, or may have acted on impulse as a result of an organic disorder. Even if the adult acts for purely prurient reasons, *e.g.*, to derive sexual gratification from a vulnerable victim, the adult may lack a subjective intent to harm.

Most appellate courts recognize the rule that when an act is so inherently injurious that it cannot be performed without causing the resulting injury, then the subjectively unintended consequences of that act cannot be deemed unintentional. *See, e.g.*, *Clark v. Allstate Ins. Co.*, 529 P.2d 1195, 1196 (Ariz. App. 1975) (inferring intent to harm from intentional striking with fists). *See generally*, Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R. 4th 957 § 5 (1984). Psychological injury is inherent when a minor is sexually abused by an adult. Therefore, damages sustained by molested minors should not be considered unintentional regardless of the molester's subjective intent. *See Mutual of Enumclaw v. Merrill*, 794 P.2d 818 (Or. App. 1990) for an analysis of this position.

(c) Inferring Intent to Harm.

The following courts found that molestation claims against an insured were excluded by a policy's intentional act exclusion, even where the court found that the molester subjectively intended no harm: *Twin City Fire Ins. Co. v. Doe*, 788 P.2d 121 (Ariz. App. 1989); *Allstate Ins. Co. v. Troelstrup*, 789 P.2d 415 (Colo. 1990); *Landis v. Allstate Ins. Co.*, 516 So.2d 305 (Fla. App. 3 Dist. 1987), *approved*, 546 So.2d 1051 (Fla. 1989); *accord Allstate Ins. Co. v. Bailey*, 723 F. Supp. 665 (M.D. Fla. 1989); *Allstate v. Jarvis*, 393 S.E.2d 489 (Ga. App. 1990); *Altena v. United Fire and Cas. Co.*, 422 N.W.2d 485 (Iowa 1988); *Perreault v. Maine Bonding & Cas. Co.*, 568 A.2d 1100 (Me. 1990); *Linebaugh v. Berdish*, 376 N.W.2d 400 (Mich. App.1985); *Allstate Ins. Co. v. Foster*, 693 F. Supp. 886 (D. Nev. 1988); *accord State Farm Fire and Cas. Co. v. Smith*, 907 F.2d 900 (9th Cir. 1990); *Allstate Ins. Co. v. Thomas*, 684 F. Supp. 1056 (W.D. Okl. 1988); *Foremost Ins. Co. v. Weetman*, 726 F. Supp. 618 (W.D. Pa. 1989), *aff'd*, 904 F.2d 694 (3d Cir. 1990); *Grange Ins. Ass'n v. Authier* 725 P.2d 642 (Wash. App. 1986).

The courts in most of the foregoing cases applied the subjective test for intent. The courts held that even though the molester did not subjectively intend any harm, intent to harm could be inferred from the intentional commission of a molestation. A similar inference obtains in cases applying the objective test, that a person intends the natural and probable consequences of his acts. In these jurisdictions, courts infer intent to harm because a reasonable person would expect that a molestation victim will incur psychological and emotional harm. Accordingly, in these cases, an intentional act exclusion precluded coverage for molestations: *CNA Ins. Co. v. McGinnis*, 666 S.W.2d 689 (Ark. 1984); *accord Allstate v. Jarvis*, 393 S.E.2d 489 (Ga. App. 1990); *Allstate Ins. Co. v. Hampton*, 433 N.W.2d 334 (Mich. App. 1988); and *Connely v. Hanover Ins. Co.*, WL No. 122550 (Ill. App. 2 Dist. 1990).

Other courts, without stating which test for intent applies, or without presenting a thorough rationale, have also held that intent to harm will be inferred from the intentional act of molestation. These cases, as well as the above cases demonstrate a general willingness among the courts to preclude coverage for molesters under an intentional act exclusion: *Harpy v. Nationwide Mutual Fire Ins.*, 545 A.2d 718 (Md. App. 1988); *Allstate Ins. Co. v. Roelfs*, 698 F. Supp. 815 (D. Alaska 1987); *Roe v. State Farm Fire and Cas. Co.*, 376 S.E.2d 876 (Ga. 1989); *Fireman's Fund Ins. Co. v. Hill*, 314 N.W.2d 834 (Minn. 1982); *accord Mutual Service Cas. Ins. Co. v. Puhl*, 354 N.W.2d 900 (Minn. App. 1984); *Horace Mann Ins. Co. v. Ind. Sch. Dist*, 355 N.W.2d 413 (Minn. 1984), and *Estate of Lehmann v. Metzger*, 355 N.W.2d 425 (Minn. 1984). *See also Illinois Farmers Ins. Co. v. Judith G.*, 379 N.W.2d 638 (Minn. App. 1986); *State Farm Fire & Cas. v. van Gorder*, 455 N.W.2d 543 (Neb. 1990); *K.A.G. v. Stanford*, 434 N.W.2d 790 (Wis. App. 1988), *review denied*, 439 N.W.2d 142 (Wis. 1989); *Dotts v. Taressa J.A.*, 390 S.E.2d 568 (W. Va. 1990).

(d) Refusal to Infer Intent.

In a few cases where courts applied the subjective test for intent, the courts refused to infer intent to harm from the insured's commission of a molestation and thus extended coverage. *State Auto Mut. Ins. Co. v. McIntyre*, 652 F. Supp. 1177, 1221 (N.D. Ala. 1987) (insurer failed to carry burden of proving its insured "subjectively possessed a high degree of certainty that bodily injury * * * would result from his acts"). In the absence of a showing of subjective intent to harm, coverage is available under the policy. *Id.* Since intent is a question of fact, the insurer owes a duty to defend until the trier of fact determines the insured's intent. *Allstate Ins. Co. v. Mugavero*, 537 N.Y.S.2d 961 (Sup. 1989), *aff'd*, 521 N.Y.S.2d (N.Y. App. 1990) (insurer cannot present evidence of insured's lack of intent to harm on motion for summary judgment). If the insured did not intend harm, the insurer must also indemnify. *McIntyre*, 652 F. Supp. at 1221.

Currently, only three state level courts appear wed to the idea that intent to harm cannot be inferred as a matter of law from the intentional commission of a molestation. *Public Service Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810, 814 (N.Y. 1981) (one who commits an intentional, even criminal, act may be indemnified if the act causes an unintended injury, provided the indemnification does not extend to punitive damages); *accord Allstate Ins. Co. v. Mugavero*, WL No. 157599 (N.Y. App. 1990); *Menard v. Zeno*, 558 So.2d 744 (La. App. 3 Cir.), *writ denied*, 561 So.2d 121 (1990) (refusing to infer intent but reviewing evidence to find that insured subjectively intended harm); *James M. v. Sebesten*, 270 Cal. Rptr. 99, 104-105 (Cal. App. 4 Dist.), *rev. granted*, 272 Cal. Rptr. 291 (1990) (intentional act exclusion not applicable where insured subjectively did not intend harm, but coverage precluded under California Insurance Code § 533).

Federal courts in two states have also refused to infer intent to harm in molestation cases. *State Auto Mut. Ins. Co. v. McIntyre*, 652 F. Supp. 1177 (N.D. Ala. 1987) (insurer failed to carry its burden of proving insured subjectively intended his non-violent sex abuse to cause harm); *Allstate Ins. Co. v. Jack S*, 709 F.Supp. 963, 968 (D. Nev. 1989) (where state law exempts minors from the criminal laws, minor's intent to harm cannot be inferred).

Given the extreme weight of authority opposed to refusing to infer intent to harm in molestation cases, the positions of the courts refusing to infer intent may be mutable. Insurers in two other jurisdictions which refused to infer intent challenged the rulings with favorable results. Courts in Florida and New Hampshire used to refuse to infer intent to harm in molestation cases. *See MacKinnon v. Hanover Ins. Co.*, 471 A.2d 1166, 1168 (N.H. 1984) (since policy did not specify that intent should be inferred from commission of inherently harmful act, court refused to do so), and *Zordan v. Page*, 500 So.2d 608 (Fla. App. 2 Dist. 1986) *rev. denied sub nom South Carolina*

Ins. Co. v. Zordon, 508 So.2d 15 (Fla. 1987). However, both states now do so. *See Vermont Mut. Ins. Co. v. Malcolm*, 517 A.2d 800, 802 (N.H. 1986) (insured's intentional act cannot be accidental when it is inherently injurious), and *Landis v. Allstate Ins. Co.*, 516 So.2d 305 (Fla. App. 3 Dist. 1987), *approved*, 546 So.2d 1051, 1053 (Fla. 1989) (implicit in Florida's statutory scheme penalizing child molestation "is the recognition that some form of harm inheres in and inevitably flows from the proscribed behavior") (quoting *Zordan v. Page*, 500 So.2d 608, 614 (Frank, J. dis., Fla.2d DCA 1986) rev. denied, 508 So.2d 15 (Fla. 1987)).

(e) Possible Question of Fact Concerning the Molester's Capacity to Act.

Although molesters routinely maintain they do not subjectively intend harm, it is a rare case where an insured completely lacks capacity to act intentionally, regardless of the insured's age. However, an insured may attempt to use lack of capacity to inject a question of fact into the coverage dispute and thereby preclude a motion for summary judgment. The insurer in such cases may seek to stay the civil litigation until any pending criminal case is resolved. If a criminal court finds the insured guilty of a crime, or accepts a guilty plea, the requisite capacity to act is established, and the insured can no longer inject a question of fact into the proceedings. *See New York Underwriters Ins. Co. v. Doty*, 794 P.2d 521, 524-525 (Wash. App. 1990) (since criminal court found that insured was not insane, insured was capable of forming the general intent required to commit the act of child molestation).

The Intentional Act Exclusion as Applied to the District

The intentional act exclusion and the occurrence language do not always mean automatic denial of coverage for all molestation cases. Generally, the above cases only deal with insurance coverage for the molester based on allegations of intentional acts. It is not surprising that no coverage exists. However, school districts and administrators as defendants in molestation cases are generally sued under a *respondeat superior* theory or for negligence, rather than intentional torts. Under a *respondeat superior* theory coverage will not exist because the school district is being sued for the molester's intentional acts. Such claims are difficult to assert as generally such acts are either outside the scope of employment or occur beyond school district premises. So, most plaintiff attorneys also assert negligent supervision or retention claims against administrators and the school district. It is these claims which trigger coverage as no intentional act is alleged against these defendants.

Other Possible Exclusions

Insurers in jurisdictions that apply the strict subjective test for intent may rely on an exclusion other than the intentional act exclusion when confronted with a molestation claim. The following are some of the exclusions that may be pursued.

- **State Law Exclusions**

Insurers might look to exclusions embodied in state laws or policies. Most states have a strong public policy which militates against providing insurance coverage for an insured's willful acts. One state has codified this policy. California Insurance Code § 533 provides: "An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured or of the insured's agents or others." However, an insurer will not be exonerated under § 533 unless the insured acts with a preconceived design to inflict injury. *Walters v. American Ins. Co.*, 8 Cal. Rptr. 665 (Cal. App. 1960), *contra James M. v. Sebesten*, 270 Cal. Rptr. 99, 104-105 (Cal. App. 4 Dist.), *review granted*, 272 Cal. Rptr. 291 (1990) (once court finds insured acted wilfully, § 533 precludes coverage). The majority of California courts require that the insured intend to injure before § 533 will preclude coverage. However, the courts are split on whether an intent to injure can be inferred as a matter of law.

- **The Sex Abuse Exclusion**

Modern versions of CGL policies are specifically excluding coverage for sex abuse. A typical sex abuse exclusion provides:

> . . . this policy shall not apply to any claim, demand or cause of action arising out of or resulting from either sexual abuse or licentious behavior or immoral or sexual behaviors intended to or culminating in any sexual act whether by or at the instigation of or at the direction of or resulting directly or indirectly from any omission by the insured, his employees, patrons or any other causes whatsoever.

Casualty Indem. Exchange v. Small Fry, Inc., 709 F. Supp. 1144, 1146 (S.D. Fla. 1989).

This provision was sufficient to exclude claims for negligent supervision, negligent hiring, and negligent care, when the underlying basis of the claims was the sexual abuse of a minor. *Id.* Similarly, an exclusion for ". . . damages awarded in suits . . . involving undue familiarity, sexual intimacy, or assault concomitant therewith," was sufficient to preclude coverage when a psychiatrist seduced a vulnerable patient. *Cranford Ins. Co., Inc. v. Allwest Ins. Co.*, 645 F. Supp. 1440, 1444 (N.D. Cal. 1986). However, the *Cranford* court found that the sex abuse exclusion did not apply to a malpractice claim based on abandonment of patient, since abandonment can occur in the absence of a sexual relationship.

- **The Penal Violation Exclusion**

Typically this exclusion precludes coverage for bodily, and perhaps personal injury, caused by a violation of the penal law committed by the insured. *See Scudder v. Hanover Ins. Co.*, 559 N.E.2d 559, 562 (Ill. App. 2 Dist. 1990) (coverage excluded where actions alleged in underlying complaint were violations of penal law). The scope and effect of the penal violation exclusion has rarely been litigated. However, since the exclusion is inherently ambiguous, opportunities for litigation are legion.

It is unclear whether the insured has to be convicted before the exclusion applies, whether mere allegations of a violation preclude coverage, or whether the trier of fact in the civil proceeding must make its own findings of criminal culpability. *See U.S. Fidelity & Guar. v. Toward*, 734 F. Supp. 465, 468 (S.D. Fla. 1990) (complaint failed to allege facts sufficient to invoke penal violation exclusion). In the latter situation, the question of what burden of proof applies becomes an issue; must guilt be established beyond a reasonable doubt, or only by clear and convincing evidence.

If the insured has already been prosecuted, the application of the exclusion is *pro forma*. However, if the insured was not prosecuted, a penal violation exclusion invites litigation, unless, of course, the insured admits to a violation in the civil proceeding.

COVERAGE FOR CLAIMS AGAINST THIRD PARTIES

Now that the vast majority of jurisdictions exclude coverage for the molester under the intentional act exclusion, or by finding that there was no covered occurrence, plaintiffs are pursuing redress from co-insureds or other culpable third parties. The legal theories pursued in these cases are well established. Negligent supervision is the gist of most complaints. This is the most frequent claim asserted against school districts in a situation where an employee is the molester. However, whether there is coverage for these third parties is less clear.

Third Party Negligence

If an insured is not the molester, and the claim is based on the insured's negligence, the courts routinely find coverage. *See American States Ins. Co. v. Borbor*, 826 F.2d 888 (9th Cir. 1987) (partner who negligently failed to supervise and investigate molester could be indemnified); *U.S. Fidelity & Guar. v. Toward*, 734 F. Supp. 465, 468 (S.D. Fla. 1990) (duty to defend where allegations sought recovery from parties who negligently allowed molestations to occur, even if those parties were also the molesters). *Accord Worcester Ins. v. Fells Acres*

Day School, 558 N.E.2d 958, 970 (Mass. 1990) ("the knowledge of one of the tort defendants concerning the abusive activities of the others, coupled with the failure to protect the children, renders the tort defendant's conduct reckless"). These decisions are based on the theory that recovery for an insured's negligence will not offend the public policy against allowing recovery for an insured's willful injury; an insured who was negligent did not, by definition, wilfully injure the plaintiff. However, there appears to be a significant exception to this grant of coverage.

- **Exception Where Policy Creates Joint Obligations**

If a policy creates joint obligations, the intentional act of one insured is imputed to all of the insureds. Therefore, if the molester is a co-insured under a policy that creates joint obligations, there is frequently no coverage for the insured's negligence if there is no coverage for the molester. This exception is purely a matter of contract limitation. Although public policy is not offended by allowing negligent co-insureds to be covered, public policy is also not offended when the insurer specifically excludes such coverage by contract.

Whether a contract creates joint, as opposed to several, obligations depends on the exclusionary language used in the policy. Some policies exclude coverage for bodily injury or property damage caused by "a" or "an" insured, while others refer only to "the insured." The courts that have specifically addressed the issue uniformly hold that the language "a" or "an" insured creates a joint insurance obligation. There is one contract between the insurer and all of the insureds. Thus, if coverage is excluded for one insured, it is excluded for all insureds. The following courts applied this rule to deny coverage to a co-insured when coverage was excluded for the molester: *Allstate Ins. Co. v. Gilbert*, 852 F.2d 449, 454 (9th Cir. 1988) (by excluding coverage for bodily injury caused by "an insured person," the insurer unambiguously excluded coverage for bodily injury caused by "any" insured under the policy); *Allstate Ins. Co. v. Roelfs*, 698 F. Supp. 815, 818 (D. Alaska 1987) (term "an insured" precludes coverage for bodily injury caused by an insured); *Allstate Ins. Co. v. McCranie*, 716 F.Supp. 1440, 1448 (S.D. Fla. 1989) ("use of 'an insured' in the exclusion language as opposed to 'the insured' results in denial of coverage for a negligent insured if another insured committed an intentional act"); *Allstate Ins. Co. v. Foster*, 693 F.Supp. 886, 889 (D. Nev. 1988) *and cases cited therein* (policy excluding coverage for intentional act of "an insured person," excludes coverage for any insured for liability arising from the harm directly related to the intentional or criminal act); *Farmers Ins. Co. of Wash. v. Hembree*, 773 P.2d 105, 108 (Wash. App. 1989) (policy excluded coverage for intentional harm caused by "an insured" which includes anyone insured under the policy).

The converse of the foregoing authorities is that the use of the term "the insured," creates several obligations. Each insured under the policy has a different contract with the insurer. Thus, the exclusion of one insured does not preclude coverage for the others. *See American States Ins. Co. v. Borbor*, 826 F.2d 888 (9th Cir. 1987). Accordingly, under these policies, a negligent insured will be covered even though coverage is precluded for the co-insured under the intentional act exclusion.

The semantic differences between the policies found to create joint as opposed to several obligations are slight. The courts have read a great deal into the language of the policy. Although the distinction the courts developed is rational, it has little basis in fact. Accordingly, courts confronted with this issue in the future may not follow the trend.

In molestation cases, the courts are confronted with two compelling objectives: deterrence and compensation. The courts do not want to permit molesters to profit from their acts, but they also recognize the expenses involved in remedying the damages caused by molestations. The tension between these two objectives may lead some courts to find the exclusionary language ambiguous and construe the clause strictly against the insurer.

In these cases, coverage may be provided for a negligent co-insured even though the policy excludes coverage for the intentional harm caused by "a" or "an" insured.

NEW DEVELOPMENTS

Although coverage issues as applied to claims against the molester are fairly well settled, and favorable to insurers, a recent case out of Massachusetts illustrates that courts may try to find coverage in unusual ways. *Worcester Ins. v. Fells Acres Day School*, 558 N.E.2d 958 (Mass. 1990).

Coverage for Loss of Consortium Claims

In *Worcester*, a group of children were molested by staff members at a day care center (the "Center"). The parents of the children sued the Center and the staff members, presenting various legal theories ranging from assault and battery to negligent supervision. Each parent also sought loss of consortium damages, i.e., each parent claimed that the molestations deprived the parent of the child's society, services, and companionship.

The Center and the staff members were insured under various homeowner and CGL policies. The insurers filed a declaratory judgment action to determine their duties under the policies. The trial court hearing the action certified eight questions to the Supreme Court of Massachusetts. One of the questions the court addressed was whether the parents' claims for loss of consortium were precluded under the intentional act exclusions contained in the policies.

Each homeowners policy covered bodily injury damages. As is the trend in the industry, each policy used an expanded definition of "bodily injury" which included "bodily injury, sickness or disease, including care, loss of services and death resulting therefrom." *Id.* at 971. The policies also excluded bodily injury expected or intended by the insured.

The insurers argued that the injuries incurred by the children were excludable under the intentional act exclusion. The court agreed, holding that an intent to injure could be inferred from the commission of an inherently harmful act such as child molestation. The insurers argued further that there was also no coverage for the parents' loss of consortium claims. The court disagreed.

The court held that because the policies included loss of services within the definition of bodily injury, the parents suffered their own bodily injury when they lost their child's services. Since the insured must intend to cause the bodily injury complained of before the intentional act exclusion will apply, the insured must have intended the molestations to result in the parents' loss of consortium. There was no evidence in the record that the insureds intended to cause the parents' loss of consortium. Furthermore, the court did not infer an intent to cause loss of consortium from the intentional commission of a molestation. Since loss of consortium claims are independent, not derivative, coverage would be available unless specifically excluded.

The court also addressed the question of whether there was coverage for the loss of consortium actions under the CGL policies. The CGL policies covered "damages because of bodily injury." The policies defined bodily injury as "bodily injury, sickness or disease sustained by any person which occurs during the policy period . . .." *Id.* at 972. The court held that the parents' loss of consortium were damages "because of bodily injury," *i.e.*, because of the children's injuries. Therefore, there would be coverage for the parents' injuries if there was coverage for the children's injuries. Since, under the CGL policies, the children could recover on negligence theories, *i.e.*, on their negligent supervision claims, the parents could recover on their loss of consortium claims, and all claims would be covered by the CGL policies.

As set out above, many policies are now including loss of services within the definition of bodily injury. This provision may expand coverage to include loss of consortium claims brought by parents when a child is molested, or a spouse when the other spouse is molested, or a child when a parent is molested.

Worcester holds that loss of consortium claims are covered unless an exclusion applies. Furthermore, *Worcester* did not infer intent to cause loss of consortium from an intentional molestation. Since most molesters maintain that they subjectively intend no harm, coverage for loss of consortium damages will not be precluded under an intentional act exclusion. In the absence of some other applicable exclusion, the insurer will end up defending, and most likely indemnifying, the insured molester when an actionable loss of consortium claim is presented. In any event, this is an issue that remains to be litigated in other jurisdictions.

Multiple Occurrences

Another holding in *Worcester* favorable to insureds flouts the current trend. As in most policies, coverage under the CGL policy was limited to bodily injury resulting from an "occurrence." The policy defined "occurrence" as "an accident, including continuous or repeated exposure to conditions which results in bodily injury." *Id.* at 973. The insurers argued that although each child was molested several times by several different insureds, there was but one "single, ongoing cause" of the injuries alleged. *Id.* Accordingly, there was only one covered occurrence as to each plaintiff, to which the per-occurrence limit of each policy applied. The court disagreed.

The court held that the various molestations by the various insureds were discrete events which precluded a finding that there was a single occurrence. In reaching this conclusion, the court relied on a case which held that each of numerous thefts pursuant to a single scheme by a single person was an occurrence. Taken to its logical conclusion, this holding suggests that each of numerous acts of molestation by a single insured could constitute an occurrence. When this holding is read in conjunction with the court's holdings that coverage is available for loss of consortium claims, under a homeowners policy, and negligent supervision claims, under a CGL policy, it is evident that the insurer could be liable up to the per-occurrence limit for each act of molestation. Since most child molestations involve repeated acts, and juries loathe child molesters, an insurer's exposure under these rules is significant.

CONCLUSION

The *Worcester* case cannot be viewed as a mere aberration of the law. It is a response to a growing epidemic of abuse and molestation cases found in today's society. The emotional harm wrought by these incidents is devastating. It's no surprise that courts may stretch to find financial resources to aid victims of molestations. As insurers broaden their policies, the possibility of triggering coverage for such claims, which have traditionally been excluded, is a distinct possibility.

Insureds should avoid policies which clearly do not cover claims for molestation and abuse. Some insurers are willing to take on the risk of coverage for such claims and do so through additional endorsements with related premium increases. Such provisions still exclude coverage for the molester but clarify that coverage exists for related claims, such as vicarious liability, negligent supervision, and others. These provisions would provide a safety net for school districts.

HOW SCHOOLS SHOULD DEAL WITH CHILD ABUSE: VIEW OF AN ACCUSED EMPLOYEE'S LAWYER

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For the readers of this book, to discuss at any length the current state of child abuse in the schools would be unnecessary. Child abuse is an issue that buffets schools from all sides. There is the obvious and understandable pressure from parents and the public to act swiftly and often with vengeance against an accused employee. The parents often publicly voice their concerns to the community. The accused employee does not have a public voice (often against the employee's wishes, on the advice of and under extreme pressure from counsel).

When asked to write this piece as to how schools should deal with allegations of child abuse, this author saw an opportunity to present some ideas on what can be done to make a devastating experience at least more understandable to the accused employee. What follows are a few suggestions on how a school board can make a frightening experience at least somewhat more comprehensible and somewhat less frightening to the accused employee.[1]

EDUCATE! EDUCATE! EDUCATE!

School districts need to educate, reinforce and repeat over and over two essential elements concerning the issue of child abuse: (1) the limitations and allowable conduct within the realm of touching of students and comments made to students; and (2) the procedure that will be followed by the school district when an employee is accused.

School districts, experts in the education of children, often completely fall down in the education of their employees. Yes, the school district may have a few pages in their policy manual of hundreds and hundreds of pages which specifically address physical contact with students and appropriate ways to speak to students. This may cover the school district if litigation comes up, but it does not effectively convey a very important message to employees.

Just as school districts have a curriculum to educate their students in all subjects, both academic and non-academic, so too should the school district establish a curriculum to educate employees in all aspects of proper conduct toward students. The curriculum should include goals and objectives and the use of different types of instructional media. In addition to addressing issues of appropriate and inappropriate conduct, attention should also be focused on the procedures that will be followed by the school district when child abuse allegations are made. When an employee is accused of abuse, a blueprint of the road ahead will at least give the employee an understanding of the process. In addition to an explanation of the process that will be followed, the district should make employees aware of the reasons for the process. This understanding can help alleviate some of the stress experienced by school employees who, when allegations are made against them, are either suspended with pay or removed from the classroom and given other activities within the school district. The employee should be informed that the action of removing an employee from the classroom is not a finding of guilt or even any type of statement of the district's position as to the employee's guilt or innocence.

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[1] My experience is totally in the State of New Jersey and with New Jersey law. While I do not really touch on legal issues in this piece, as I am concerned more with addressing the emotional experience, I would just like to note that if there is any reference to legal proceedings in a more than general way, it is based solely on my New Jersey experience.

Schools should include the support staff in their child abuse training program. Bus drivers, teaching aides, secretarial and clerical staff, custodial staff, security guards, cafeteria aides are all susceptible to allegations of child abuse, and all need education. Employees, such as bus attendants and security guards, who are called upon as part of their jobs to physically restrain students when appropriate frequently find themselves the target of abuse claims.

UNDERSTAND

The appropriate care and education of students is the ethical basis of every school employee's performance. When a committed school system employee is accused of child abuse, it is the equivalent of an allegation of an ethics violation against an attorney. It strikes at the very heart of that employee's performance, as a professional or as support personnel. As such, an allegation of abuse causes extreme emotional reactions in employees: anger, fright, depression.

In certain school districts students have created disruption and trouble for teachers, and focused attention on themselves, by making allegations of abuse. In these districts, administrators, understanding and following their legal obligations, have called in state authorities as mandated by law whenever such an allegation surfaces. Then the school administration has rushed through the subsequent procedures because, for the administrators, it was a routine and unremarkable event, and they had no reason to doubt that the result would be a finding by state investigators that there was no abuse.

However, even in a situation which appears to be totally routine and mundane to an administrator, to the accused individual the situation is quite frightening. Schools should understand that the employee wants time to consult with his or her union, attorney and others with information. While the administrator may have been through the drill a hundred times, it is new for the employee and quite stressful. For example, in one elementary school, nearly half of the teachers had had abuse complaints made against them at one time or another, most of which had resulted in findings that no abuse had occurred. But for one young teacher accused of abuse, it seemed to her that her career was over and her reputation ruined. Eventually, like her co-workers, she was cleared of the allegations. Education as to the procedures before any charges had been made and more support from her supervisors would have eased the situation for the teacher.

INTERVENE EARLY

A small percentage of school employees are timebombs waiting for an explosion to happen. These employees are having problems in classroom control long before any actual abuse problem surfaces, and usually are known to their fellow teachers and to administrators. Often the problem becomes compounded when these teachers who already have problems with classroom control are assigned to unruly classes with difficult to educate students.

Understandably, providing help to a teacher with performance problems or removing that teacher when the problems are not yet out of hand requires more effort than discharging or disciplining an employee who has in fact abused a student. However, it is part of the job of the school administration to act in order to prevent known problems from deteriorating to the point of physical or emotional danger to students.

CONCLUSION

Abuse will never be totally eliminated from the schools, nor will false accusations. However, with education, understanding and prompt intervention, at least some of the stress of the situation can be prevented.

WORKING TOGETHER FOR THE SAKE OF CHILDREN: A PROSECUTOR'S VIEW

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According to the best data available, 1.5 million children in the United States are the victims of "very severe" violence (described as being kicked, punched, burned, or threatened with a weapon) *every year*. It is estimated that 2000 American children are murdered *every year*. Up to 38% of all women and 16% of all men in this country were subjected to some form of sexual abuse during childhood.

JIMMY'S FAMILY: A CASE STUDY

Jimmy was born on November 1, 1982, the fourth child of ten siblings. Prior to his birth, an infant brother had choked to death on pepper under suspicious circumstances, and another brother had been removed from home because of severe physical abuse. The family lived in a midwest county with a total population of about 100,000 made up of one town of 75,000, many farms and smaller towns and villages. The county was generally middle class, politically conservative and racially homogeneous. The largest city had a professional, well-trained police force; the county sheriff's office was also appropriately staffed and trained, the child protective services (CPS) agency was highly motivated, and the prosecutor's office was dedicated and efficient.

Jimmy died — a homicide victim — before he turned ten. The precise cause of death could not be determined because of the condition of his body when it was found. Between the time Jimmy turned seven and the discovery of his death (two years later) county sheriff deputies went to his house nearly twice a month every month. They were usually responding to reports of domestic violence, though some of the calls were from neighbors concerned about the children's welfare. Their reports always described a filthy house and frequently noted the house was infested with bugs. No arrests for assault were made.

CPS caseworkers went to Jimmy's house almost as often, because of reports from neighbors about violence in the house. CPS suspected the father had an alcohol problem and was abusing his wife, but their reports described only a dirty home. The children, though dirty and withdrawn, did not appear malnourished or physically abused. No CPS worker talked to the children. The social workers occasionally arranged for food stamps and Medicaid and provided practical household management assistance to the mother. Investigators from the health board also went to Jimmy's house six times during these years.

Additional incidents involving the family over this period included the father's arrival at the County Health Department in a highly intoxicated state accompanied by all the children. No action was taken other than advice to health workers to make other arrangements for the children's car trip home. In another instance, a CPS case aide transported Jimmy's mother and the children to a battered women's shelter. All were visibly bruised; but no investigation took place. In another, Jimmy's eldest brother arrived at the hospital drunk and with a gunshot wound in his foot. The boy said he shot himself. An allegation that the father sexually abused his daughter was not referred to police. The girl was interviewed by social workers at home with her father in the next room.

Two county hospitals and three different doctors treated Jimmy half a dozen times for injuries, none of which were life-threatening. Medical records indicate suspicion regarding the injuries, but that suspicion was never passed on to child protective services. Although enrolled in two different schools, Jimmy was absent 35 days during third grade and never attended school the fourth or fifth grade. Teachers at one school reported severe bruises on Jimmy during one period of attendance, but there was no subsequent CPS investigation or report to law enforcement. School records show a brother was also referred to social workers after arriving at school with a black eye.

The social workers never knew the sheriff visited the home, were unaware of Jimmy's school absences, and did not receive any reports from the county health board. The deputies did not know CPS ever visited the family or that Jimmy missed so much school. The health board was never told of any visits by CPS workers or deputy sheriffs. No one other than the hospital staffs knew of Jimmy's medical treatment, though his arm was in a cast for six weeks when he was seven. None of the deputies, social workers, health board inspectors who visited the house counted the children during their visits.

One day in what should have been Jimmy's tenth year, his aunt walked into the sheriff's office and told a deputy she was afraid Jimmy was dead. She believed his father had killed him. Jimmy's body, burned beyond recognition, was found buried near his house. He had been dead nearly a year and a half. His skull was severely fractured, and one of his arms had an unhealed fracture. His father was charged with manslaughter, his mother with felony child abuse for failure to protect him. His surviving brothers and sisters were placed in three foster homes.

The case of "Jimmy's Family" is true. While there has been some progress in building the kind of interagency coordination needed to respond effectively to child abuse, much still needs to be done.

Could Jimmy's death have been prevented? The sad answer is yes, it probably could have been. Had the sheriff's deputies known of the social workers' visits, had the social workers known of the reported violence, had both agencies known of his unexplained absences from school and hospital visits, perhaps Jimmy would be alive today. Perhaps his brother, sister and mother would have been spared some of the beatings they apparently suffered for years. Perhaps his sister would not have been sexually abused. The point of this scenario is to demonstrate that protection of children is not exclusively the responsibility of social workers or police in our communities but of all agencies that come into contact with possible abuse. Since teachers and other school personnel generally see more of children on a regular basis than any other adults except their parents, educators are especially critical to a child's safety and health.

In an ideal world, only parents would be responsible for child protection. Unfortunately, as teachers and school administrators know all too well, parents too often are the reason children **need** to be protected, as was the case with Jimmy. Generally, teachers are especially motivated to protect children. They understand in choosing a career as educators that although children do not vote, hold jobs, or pay taxes, they are the future of the community.

Given their obvious investment in children, it is no surprise that teachers and school administrators sometimes view social workers, police investigators and prosecutors as uncaring, interfering, self-promoting bureaucrats. Prosecutors sometimes, on the other hand, perceive that teachers and school administrators are obstacles rather than allies during the investigation and prosecution of child neglect or abuse cases. It is the child victim who pays the price of this distrust through suffering and in rare (yet too frequent) instances through death. This article is an attempt to remove some of that distrust by explaining generally how the criminal justice system operates, what part teachers and school administrators can play in that system without compromising their professional responsibilities, and how a team approach can improve child protection efforts in a community.

THE PROSECUTOR'S ROLE

Prosecutors are attorneys employed by the executive branch of government to enforce the law. Prosecutors may be employed to enforce the law of municipalities, states, or the federal government. Offices will generally have one chief prosecutor and one or more assistant, or deputy, prosecutors, depending on the size of the community. While in most states the chief prosecutor is elected, she may be appointed by either the governor of the state, or the attorney general of the state. Assistant prosecutors are appointed by the chief prosecutor. Depending on local law or policy, the prosecutors may represent the state in civil as well as criminal matters. Included in civil matters are child protection cases in which the state alleges the child is not being properly cared for by his parents and can therefore call for the child's temporary removal from home or termination of parental rights. The lack of proper care could range from dangerous neglect to intentional physical or sexual abuse. The burden of proof is much lower in child protection cases than in criminal cases. Child protection cases generally are decided by a judge. Persons charged with crimes are entitled to have a jury determine whether the prosecutor — also referred to as the "state" — has proved the case.

A prosecutor has a legal and ethical responsibility to prosecute those accused of crimes, protect the innocent, and ensure public safety. These goals must be met within the framework of constitutional restraints on state power and authority. The prosecutor must consider jurisdictional policy and resources as well as community standards and expectations in deciding whether to file criminal charges or institute child protective proceedings, on a case by case basis. In criminal cases, for instance, she must decide not only whether available facts would justify conviction, but whether conviction would accomplish the goal of "seeking justice" in a particular situation. In deciding whether to institute child protection cases, the prosecutor must decide whether to do so is in the child's best interests. The only proper way in which these difficult decisions can be made is to review the results of a thorough investigation.

Generally, suspected child abuse is reported to the police department, either by child protective services or a concerned person. A police officer is then assigned to investigate, which involves speaking to potential witnesses, collecting physical evidence (clothing, pictures, laboratory samples and other items) where possible and writing a report about what has been found. The officer's job is to find out as much as possible about the suspected criminal activity. The police report is then sent to the prosecutor for evaluation. While the police sometimes make the determination regarding filing of criminal charges, charging decisions ultimately are the prosecutor's responsibility.

CRIMES AGAINST CHILDREN

Decisions regarding any crime, including crimes against children, should be consistent and made quickly. Crimes against children, however, typically involve issues not present in crimes against adults, property, or the public order. Not the least of such special considerations is the fact that typically the only eyewitness to a crime against a child is the victim himself. Rarely is there any physical evidence such as injury, a weapon, or photograph of the suspect committing the crime. Family dynamics, community values and expectations, popular myths and stereotypes are other factors which bear, directly or indirectly, on the ultimate outcome in the prosecution of a crime against a child. In short, investigation and prosecution of crimes against children require a unique approach.

THE TEAM APPROACH

Communities which demonstrate the greatest success in handling investigations and prosecutions of crimes are communities in which there is some form of a team approach to child abuse reports. (Note that success is measured not in numbers of prosecutions or convictions, but in the quality of the truth-seeking process that should typify investigation and prosecution of criminal conduct.) In such communities, law enforcement, child protective services, prosecutors, the medical community and schools understand each other's responsibilities and authority. There is appropriate sharing of information and open communication. The agencies and people who see and work with children on a routine day-to-day basis know what to do if abuse or neglect is suspected and what other agencies and people will do once a report has been made. This team approach may be informal or mandated by an interagency protocol or written agreement. Because teachers, school administrators and other school personnel see children several hours a day five days a week and are often trusted by children, they are an invaluable part of this team effort. If there is no interagency team in the community, schools should consider taking steps to implement one.

Creation of a child protection team must begin with the identification of resources. Who works with children on a regular basis? Who has expressed an interest in children's issues? Who investigates suspected child abuse? Who prosecutes persons accused of criminally abusing children? Who represents the child protective agency in civil cases? Once those people and agencies are identified, they must be brought together to discuss common goals in child protection and how to achieve them. Finally, a protocol must be prepared formalizing the investigative and information-sharing process. Prosecutors generally welcome assistance from any corner when offered in a manner which will result in improved investigations. Team formation and investigation of child abuse is a proven method to accomplish that.

THE SCHOOL'S ROLE WHEN ABUSE IS SUSPECTED

Recognizing Indicators of Abuse

A child who is neglected, physically or sexually abused often exhibits particular physical manifestations and behaviors. None of these are diagnostic or "litmus" indicators of abuse or neglect, but should give the concerned observer cause for some action. In every state, the presence of one or more of these physical manifestations or behaviors, depending on their context, severity and repetition, could justify, or mandate a report:

Physical Abuse

- any injury not on bony prominence
- bruises with distinctive shape of weapon
- "raccoon eyes" (indicating possible head injury)
- immersion burns (from scalding water)
- unexplained fractures
- explanation of injury inconsistent with injury
- wearing inappropriate clothing to cover injuries
- unexplained or abnormally long absences from school
- fear of physical contact

Sexual Abuse

- difficulty in sitting or walking
- torn, stained or bloody underwear
- sore or itching genitals
- sexually transmitted disease
- age-inappropriate knowledge of sexual conduct
- inappropriate sex play with toys or peers
- wearing excessive amount of clothing
- drawings of genitals
- fear of physical contact
- public masturbation
- fear during discussion of genitals or sex

In addition children who exhibit enuresis, rocking, withdrawal or anti-social conduct, obsessive or compulsive behavior, overly adaptive behavior, (such as parenting other children), overly aggressive or passive conduct, or other highly unusual behaviors may be experiencing some sort of severe stress in their life. Abuse should at least be considered a possibility under such circumstances, and the appropriate report or referral made. Remember, however, that the most reliable "indicator" of child sexual abuse is a clear statement from the victim describing the abuse in the victim's own words and language.

Listening to Children

As noted, teachers are often viewed by children as trustworthy persons of authority. They are also considered by their students to be interested in their personal as well as their academic lives. To a child, a teacher is an adult who can solve a student's problems and will listen in a non-judgmental way to the student's concerns. This is why teachers are often the first to hear reports of sexual and physical abuse from students. It is important, therefore, that their response does not discourage the child from further disclosures or influence the child's statement.

When a disclosure of abuse is made, it is critical that the listener not react in a visible way to what is sometimes horrific and repulsive information. Often, a victim is "testing the water" and will stop or even retract a disclosure if she thinks she is upsetting the listener, or worse, is not being believed: Regardless of the listener's personal belief in the truth of what is being said, it is imperative that he not challenge the child's statement. The job of a teacher receiving a report of abuse from a student is simply to be a listener. Once a report is made, an investigation will be instituted. The results of that investigation will determine whether any action is taken. An accurate and complete report of the initial disclosure will assist the investigation immeasurably. Allowing the child to make as complete a report as she feels able to make, without expressing disbelief or shock, may also save the child the stress of repeating the information several times.

Once the child has said as much as she feels able to say, she should be thanked for her courage, told what the teacher must do with the information, and reassured that the teacher will do what he can to insure the child's safety. It is important also to inform the child that what has happened is not the child's fault. Do not promise more than can be delivered. If the school cannot, for instance, guarantee the child's safety, do not tell her that it can. The abused child has probably been lied to a great deal. Remember that it is only because of her trust that she will not be lied to or manipulated by her teacher that she has decided to disclose these intimate facts. Perceived dishonesty on the listener's part, no matter what his intentions were in making the promise, will serve only to further alienate the child from adults. Her resulting recantation or refusal to assist in the investigation could well mean she is put back in the abusive situation where consequences of attempting to disclose may result in an increased level of abuse. This "downward" spiral of events will almost certainly mean that the child will be very reluctant to trust an adult enough to disclose her abuse, regardless of the consequences to her. The perpetrator will also get the message that the system is unable to protect the victim, and he will see himself as empowered to continue the abuse without fear of intervention. The way in which a child's disclosure is handled is therefore absolutely critical to her well-being.

Reporting to Authorities

A teacher should not, under any circumstances, attempt to investigate a suspected case of child abuse or neglect. If abuse is suspected, a report should be made to the agency prescribed by law. In most states, reporting to a superior or an administrator does not constitute a "report" mandated by law. If policy requires that the school administration be notified, it should be notified after the agency prescribed by law has been notified. If the report is based on something other than admission of abuse or neglect by a child, such as the teacher observing unusual bruises or injuries, the reporter should document her reasoning in as much detail as possible. It may be several days before the reporter is questioned about the basis for the report, and a detailed account of the facts that caused her to suspect abuse will help refresh memory at a later time.

If the reporter is a school nurse, the child's medical chart should be as complete as possible. Drawings or sketches showing the relative size and location of injuries can prove invaluable since injuries often heal and disappear within a short time. Accurate photographs which "freeze" the injury in time are also helpful. If photographs are routinely taken of injuries, such as may be suffered on the playground, this is a particularly helpful method of preserving the nurse's observations.

Working with Other Agencies

Teachers often complain that once they make the required report, they are never told whether an investigation took place, or of its outcome. They often see children returned to an abusive situation. The lack of follow up information and apparent failure of the system to protect children often causes teachers to become skeptical, sometimes to the point of refusing to report their observations because "nothing will be done anyway." This reaction, while understandable, does nothing to protect children. Instead, teachers and administrators should find out what agencies are responsible for protecting children in their community and then meet with agency heads and "line workers" to get an understanding of their responsibilities and procedures. Ask what happens once a report of suspected child abuse is made to the appropriate agency, and explain the school's concerns and frustrations. Try to work on solutions that are mutually satisfactory. Is there a written inter-agency protocol describing how reports are investigated? If the schools are not included, why not? While individuals cannot make policy for an entire school district, the reality is that one person is often the initial impetus for action at the district level. Perhaps an in-service day dedicated to inter-agency meetings could get this process started. If no one has the information needed to coordinate the meeting, it will probably never occur. Often, all that has been lacking in a community is one person who has the initiative to start the process. Once started, others will be discovered who share similar frustrations, concerns and willingness to work toward solutions.

Testifying

On occasion, teachers or school administrators are required to testify in child abuse cases. Because of the adversary system, this is an uncomfortable role for many people. Witnesses often see themselves as "for" one party, therefore "against" the other. This may be particularly true when a teacher used to speaking "for" his students receives a subpoena to testify. Generally, the subpoena is issued at the request of a party to a lawsuit, with the implication that the person receiving the subpoena is to testify "for" that party. Generally too, the party issuing the subpoena thinks the witness has information favorable to his position. However, the true function of a witness in any lawsuit is to *tell the truth.* While this may seem simple enough, we all know it is not. Perceptions and memory are difficult to retrieve under pressure. Witnesses who remember their loyalty lies with the truth and not with either party, whatever their sympathies might be, can improve their ability to perform the function of a witness (and their comfort level).

There are other ways a witness may increase her ability to function comfortably. First, it is not necessary or advisable to be a passive witness. Once a subpoena is received, the person issuing it should be called. (Usually this will be reflected on the subpoena, along with a contact person and a phone number. Many prosecutors' offices also send letters, or have other means of advising people they will receive a subpoena before they actually receive it.) Find out, if not already known, the reason for the subpoena. What information is expected to be provided? Schedule an appointment to meet with the lawyer who will be asking the questions on direct examination. Persist until all questions have been answered satisfactorily. Do not be bashful about finding out all that is necessary to be as comfortable as possible when testifying.

Keep in mind that testifying is stressful but rarely injurious. Children as young as three years of age testify in criminal cases. Most witnesses who are properly prepared (not coached) report that testifying was a positive experience. Prosecutors generally appreciate any witness who is interested enough in the process to find out what is expected. Without the cooperation and participation of witnesses, the prosecutor cannot succeed, so questions about what will happen at trial are important. If the prosecutor does not initiate this preparation process, please do not assume that means she is not interested. It more likely means she has too much to do in too little time with too few resources. The witness's initiative might even be able to help the prosecutor formulate a better process of preparation.

CONCLUSION

Prosecutors, like education professionals, are interested in the well-being of children. Prosecutors would like to see that every person who criminally abuses a child has to answer for that harm. We also want to ensure that children are not re-victimized by "the system." We need help from the schools. Be our partners in this endeavor.

SCHOOL SOCIAL WORK PERSPECTIVES ON CHILD ABUSE

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There is more to helping abused children than merely articulating the problem and developing a procedure for handling it. Many are the monographs, procedural manuals and planning guides sitting on school office shelves, whose pages have never been cracked, much less had their suggestions acted upon. Dealing effectively with child abuse in the school system is a matter that deserves the fullest and clearest communication possible. Considering the gravity of this issue, especially from the point of view of the child's future well-being, there is no room for foot dragging or professional jealousies and competitiveness. Many of the abuse cases that have made the national news in recent months attest to the fact that this behavior has not served abused children well. Each individual professional involved with child abuse issues must take on the role of child advocate. Any lesser role is ineffective in confronting the myriad of problems that accompany child abuse.

The school, above all other groups who serve families, is a microcosm of the larger society. Children must attend school; when they come to the classroom, they come bearing all the gifts *and* the problems inherent in their individual family systems. Schools, therefore, have an obligation to address not only the academic needs but also the social needs of the child.

In order to do so, schools must face six problem areas that affect their ability to work with other community agencies:

- Clear and positive communications
- Assumptions
- Follow through
- Lack of understanding and trust
- Procedural ineptitude
- Persistence in training.

CLEAR AND POSITIVE COMMUNICATIONS

Many children fall through the cracks each year because adults fail to communicate clearly with other people in different professions who may have contact with children. Because each person comes from a different perspective and has their own perceptions of a subject, communications are very likely to break down even in the best of situations. Using "jargonese" when reluctant or insecure in dealing with the subject of child abuse can sometimes lead to a failure to communicate.

Suggestions

- Acknowledge the limitations and merits of all professionals who may be involved in a child abuse case. Stereotypes regarding each profession militate against cooperation. Learn about the work, the agency restrictions and the professional expectations of those with whom the school must work. This effort will go a long way in promoting the progress of each child; it may even *prevent* a child from being abused.

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- Know the state's child abuse statute.
- Dispense with jargon and talk plain English.
- Clarify, explain and spell out acronyms. Don't be afraid to ask.

ASSUMPTIONS

School district administrators and principals have been known to block child abuse reports by teachers and other staff. Aside from being against the law in most states, this attempt to suppress reports sometimes stems from ignorance and incorrect assumptions. For example one of the reasons often given for blocking a report is this statement: "I've known this family all my life and they're an upstanding family in this community. I cannot believe they would abuse their children." In other words, the individual sees an ideal situation where none exists. The statement ignores the fact that some families, regardless of class, religion, race or ethnic background, abuse their children.

Suggestions

- Schools and school officials should explore how their own philosophies, policies and attitudes on discipline, punishment, children's rights, families etc., may relate to their reaction or inaction regarding child abuse.
- Schools should develop a heightened sensitivity to the social needs of children.
- View problems from a variety of angles — otherwise children may fall through cracks into unimaginably, horrible situations.

FOLLOW THROUGH

Even though the brunt of responsibility to act falls on child protective services because it is the mandated agency for investigating child abuse, this does not absolve the school of its on-going obligation to provide help. More than likely an abused child will continue to attend the same school district and should be assured of its continuous support during this crisis in his/her life.

Suggestions

- Schools should communicate with child protective services to determine what specific supportive action should be taken by the school to meet the needs of the child.
- If CPS fails to respond to the school's offer to assist, the school's designated liaison person for child abuse or the teacher who reported the abuse should make a friendly call to ascertain the progress of the case.
- Communicate with other child abuse agencies on a regular basis. Effective follow through is a product of having maintained communications with child protective services during the process of developing policy, on-going inservices, procedures, etc., *prior* to any instance of child abuse.
- Work with the child to enhance self image.
- Provide support for the family — parenting education, child abuse prevention strategies, etc.

Once a school has made a report of abuse, there is *little doubt* that there should be follow through by the school.

LACK OF PROFESSIONAL UNDERSTANDING AND TRUST

There is a lack of trust and understanding between schools and the investigative arm of social services departments. Some school districts refuse to report cases of child abuse because in the past protective services has failed to remove certain children from their homes, did not act quickly enough, or handled a case differently than the school district expected! Differences of opinion as to how an abuse case should be handled sometimes arise from a school district's lack of knowledge regarding the legal issues, procedures and restrictions relating to child abuse which control the authority of social service departments, district attorneys' offices, police departments and courts. This lack of understanding reduces opportunities for interaction and discourages cooperation with procedures which differ from school procedures.

Suggestions

- Consistent efforts must be maintained by both child protective services and school districts to help each understand the unique problems that the other faces in dealing with child abuse cases.
- Schools should be apprised of juvenile court philosophy and procedures.
- Child protective services should be apprised that teachers have responsibilities to other children that may prevent an "immediate" report of suspected child abuse.
- Make an effort to know people personally who work within each system. Established personal and professional relationships can make it much easier to handle a crisis.
- Periodic meetings among designated coordinators for both groups (schools and child protection) would facilitate a proactive approach to child abuse matters.
- A meeting between school and child protection agencies should be held immediately when procedural problems arise.
- Stop griping or knocking the other parties involved in a child abuse case. Constantly keep in mind the objective of all — to serve children.

PROCEDURAL INEPTITUDE

School districts sometimes develop excellent policies and procedures but fail to follow or implement their own good intentions! In such cases, law suits and exposes in the newspapers are sure to follow.

Suggestions

- There should be a person with a background in the child abuse field officially designated in each district school building to ensure compliance with school district policy and procedure and applicable statutes. Part of this individual's responsibility should entail monitoring the many revisions of the state child abuse laws whether by legislative amendment or judicial interpretation. This person should provide consultative support for teachers and administrators.
- All staff serving the school (administrators, teachers, bus drivers, custodians, secretaries, food service personnel, etc.) should have a copy of the district's child abuse policy and procedure.
- All staff should be required to attend at the beginning of each school year a session to review the policy and to answer questions from existing and new staff.
- Apprise all staff that this policy must be followed!

PERSISTENCE IN TRAINING

The initial enthusiasm present when developing new programs and procedures has a tendency to wane as time passes. All those involved in the planning and development tend to go away thinking that the task is done once and for all when in fact the problem has simply been intellectualized and no effective action has yet been taken.

Suggestions

- Training and inservice must be ongoing for all building staff.
- Inservice and training must be done at least once a year.

There are many people such as educators, school social workers, police officers, attorneys, nurses, doctors and others who would be excellent trainers. Training is essential to update and refresh items of procedure for continuing staff and to apprise new staff of the school's expectations with respect to child abuse issues. Continuing education to keep abreast of current developments is just as important in the realm of social issues as in the realm of academic issues.

CONCLUSION

Despite the fact that the urgent needs expressed herein have been outlined and reiterated in numerous articles, books, monographs, journal articles and newspaper articles across the nation since the enactment of the federal child abuse law in 1974, it is still necessary to revisit all these issues. After 20 years of intensive attention by public schools, departments of education and teacher training institutions, many of the same old problems still exist — lack of agency interface, belief systems which hinder bringing help to children, professional competitiveness that gets in the way of swift and efficient action for abused children and procedural snafus, just to name a few. There are a lot of models, strategies and resources in place. The time has come to use them!

WHAT REMAINS TO BE DONE? PROPOSALS FOR LEGISLATIVE AND POLICY CHANGE

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INTRODUCTION

The authors of the earlier chapters of this book have done a fine job of highlighting a variety of legal concerns for school administrators related to child abuse and neglect. This chapter is based on my personal views about the legal issues and barriers affecting educators' approaches to child maltreatment, as well as my tenure on the U.S. Advisory Board on Child Abuse and Neglect. It will pull together the threads of those reforms mentioned by other contributors to this publication and share my thoughts about enhancements not addressed by them. Hopefully, this chapter's organization of law and policy reform topics will help educational administrators and local school boards play a more meaningful and effective role in child protection.

The first section of this chapter will address school involvement in cases of alleged *intrafamilial* abuse or neglect of children. The second section will address the subject of school handling of cases of *extrafamilial abuse*, including alleged abuse of students *by school personnel*. The third section will explore the school's growing role in the *prevention of child abuse*. The final section will discuss how laws and school policies might better promote school involvement in the *treatment of child victims of abuse*.

SCHOOL INVOLVEMENT IN CASES OF ALLEGED INTRAFAMILIAL ABUSE OF CHILDREN

Beginning with the first State mandatory child abuse reporting laws in the mid-1960's, school teachers and other personnel have been recognized as key professionals in the identification of suspected victims of parental maltreatment. Yet, there is still substantial evidence that child abuse and neglect are *grossly underreported* by those in the schools who are legally obliged to make their suspicions of children's victimization known to proper authorities. Since the schools have everyday access to greater numbers of children than any other institution, the failure of school personnel to spot and then promptly report reasonable fears of in-home child maltreatment can lead to unnecessary tragedy. Clearly, one of the purposes of this publication is to remind school boards and their attorneys of how important it is for schools to improve their responses to child abuse and neglect.

Where State laws do not make it absolutely clear that school teachers, nurses, social workers, psychologists, counselors, and principals all have the legal responsibility to report suspicions of intrafamilial child abuse or neglect to child protective services (CPS) or law enforcement authorities, they should be revised accordingly. Statutes should also make it clear that any school employee who reports suspected child abuse or neglect to a principal or other administrator pursuant to internal system policies is thereby not absolved of the responsibility of having the report communicated to CPS or law enforcement (i.e., the appropriate recipient agency). Laws should also specify that when principals or other admin-istrators receive such a report, that they are then legally obliged to promptly transmit it — without modification — to the recipient agency. I would like State laws to establish a criminal offense for anyone who withholds, or improperly discourages pe-sonnel in making, reports of suspected child maltreatment. Such laws should also penalize the taking of retaliatory personnel actions against any school employee, or contractor, who exercises a legal responsibility to report, or causes to be reported, child abuse or neglect.

Low child maltreatment reporting rates from schools further suggest that not enough has been done to train school personnel on child abuse and neglect identification and reporting. State legislation can mandate both pre-service and periodic in-service training on this. Laws can also require that this topic be required in the educational curriculum for any new teacher prior to certification. Manuals on State and local reporting policies need to be developed and maintained, and such policies posted conspicuously, at all schools. Creative use should be made of existing materials designed by child abuse specialists and national educational groups to better inform school employees of their obligations, as well as materials describing model teacher awareness programs throughout the country.

Once a report has been made on a child's behalf by anyone connected with a school, CPS should be legally obligated to *provide feedback* to that reporter (as well as the school principal/administrator) on the outcome of the investigation. We have long known that one of the reasons school employees fail to report is due to a lack of confidence that their reporting will do any good, as well as a concern about the competence of CPS intervention. Feedback — i.e., keeping the school "in the loop" after a report has been made — is absolutely essential. After a school employee has become involved in any way with CPS over concerns related to a specific child, the law should also assure that findings from any further reports of the child's maltreatment, even if not originating from the school, be shared with school personnel who have responsibility for the education of that child. The purpose of these policy reforms should be to make the schools active partners in the protection of their students.

In that regard, much more must be done to have schools participate in the work of local interagency, multidisciplinary child protection teams. Ideally, State legislation would mandate school system representation on all local child protection teams, including those specifically addressing, in cases of school-age children, child sexual abuse and child fatalities. State education agencies should promulgate guidelines for such local involvement in community child protection team work. Such guidelines should include clear instructions on the sharing of school-based child and family-specific information and records — with a view towards making that material fully accessible when clearly related to the health and safety of any child in that family.

In connection with sharing of information, it is important to note that the U.S. Congress acknowledged that "confidentiality" has been inappropriately used to inhibit interagency cooperation and coordination in child protection cases. As part of the Juvenile Justice and Delinquency Prevention Amendments of 1992 (Pub. L. 102-586, Section 9) the confidentiality of records provision [Section 107(b)(4)(B)] of the federal Child Abuse Prevention and Treatment Act (42 U.S.C. § 5106a) was amended to add a requirement of **"prompt disclosure of all relevant information to any...entity...with a need for such information in order to carry out its responsibilities under law to protect children from abuse and neglect."** The congressional findings that accompanied this amendment stated: that "thorough, coordinated, and comprehensive investigation will, it is hoped, lead to the prevention of abuse, neglect, or death," that "often the purpose of confidentiality laws and regulations are defeated when they have the effect of protecting those responsible," and that "comprehensive and coordinated interagency communication needs to be established...." At the time this chapter was written, the federal agency responsible for State grants under this law (the National Center on Child Abuse and Neglect) was hoping to soon release new proposed federal regulations governing State actions pursuant to the child maltreatment enhanced record-sharing provision. It is not clear how schools will be affected by these regulations.

Barriers to an effective response to alleged intrafamilial child maltreatment have also been caused by conflicts between CPS and the schools in the investigative response to reports. Problems in CPS investigator access to schools, to alleged child victims and witnesses, and to relevant records have all been widely reported. Because of this, State law should clearly authorize CPS and law enforcement agencies to conduct investigatory interviews on school property, but require that these be done in a manner that minimizes disruption to the educational environment.

Also, because some students may feel more at ease talking about their parents' mistreatment with school personnel that they know and trust, school boards should identify key professionals in each school for training in proper procedures for interviewing children about suspected abuse. Increasingly, such training is being provided for the purposes of developing a specialized cadre of child abuse interviewers. Where laws or policies give CPS or law enforcement the lead responsibility for such interviewing (or where joint interviewing is encouraged), the law should permit a properly trained school person to be involved in that process. The law should also give clear authority to release and transport a child alleged to be abused or neglected to social services, law enforcement, or medical authorities for purposes of physical examinations or emergency placement.

Relatedly, schools should have written policies addressing the issues of release of a child to parents or other caretakers, and access to the child within the school (or at any school-related activity or program), where a parent or caretaker (especially a non-custodial parent) is under investigation for suspicion of abusing a child. Schools would also be aided by statutes that clearly authorize them to restrict from access to school property, or school records, any parent who is the subject of a substantiated report of, or criminal conviction for, child abuse. Courts should be given the discretion in abuse-related cases to issue orders restricting the abusive parent's access to the school and school records. Laws might also appropriately give courts and schools the authority to limit parental access while criminal charges are pending or an accusation is being investigated by CPS. This issue is also briefly discussed below, in that it relates to prevention of child maltreatment resulting from *custodial interference* (parental kidnapping) that can begin with a child improperly taken from a school.

There are a few unusual issues related to intrafamilial abuse that require special attention by school administrators and their attorneys. Schools may become aware of three uncommon forms of child maltreatment included under most State child abuse and neglect laws. The first is the *parental withholding of medical care and attention* to a child which is based solely on the parents' religious convictions and practices. School nurses, in particular, may first become aware that an ill child is being deprived of necessary treatment — sometimes with potential life-threatening consequences.

Given the sensitive First Amendment issues involved here, schools should have clear written policies on which situations — where children seem to be lacking needed medical attention — must be communicated to principals and other administrators. Clearly, those cases where a child's life is endangered by the lack of a physician's care need to receive priority attention under such policies. Regardless of how State law protects the rights of parents (for example, those who rely on spiritual healing), child protection agencies and the courts have clear authority, and a duty, to intervene when non-treatment of a child becomes a life-or-death matter.

School psychologists and social workers may become aware of the second type of reportable condition: a situation where a child is suffering from *emotional or psychological* *maltreatment.* This is one of the most underreported forms of child abuse and neglect, yet school personnel may be in an excellent position to observe and evaluate the impact on children of in-home humiliation, terrorism, and restrictions on socialization that can have a profound impact on a child's mental health (not to mention educational functioning). School systems need expert guidance on the development of identification tools and intervention protocols in cases where parents are inflicting severe mental injury on their children.

The third type of child maltreatment requiring special attention is *educational neglect.* Under many State statutes, the interference of a parent with a child's education can give rise to protective intervention (as well as criminal penalties against the parent). This is the one aspect of child maltreatment that a CPS agency is most unlikely to address. For that reason, State educational agency personnel should meet with CPS administrators to develop policies and protocols on the handling of educational neglect cases. The connections between cases of protracted school truancy and child maltreatment need to be better explored, with school attendance personnel given special training on child abuse and neglect identification and intervention. Obviously, extended school absences without satisfactory parental explanations (and attentiveness) may be suggestive of chronic child neglect. There is a clear relationship between the chronic juvenile truant "status offender" and the possibility of intrafamilial maltreatment. School boards, juvenile court judges, and CPS administrators may want to convene meetings that explore ways in which these parallel issues can best be handled to the benefit of affected children.

Finally, I have a few thoughts about a controversial issue raised in another chapter: the question of whether, and if so when, a child's sexual activity should be reported to child protective social services or law enforcement authorities. Although this issue really falls more appropriately under the area of *extrafamilial child abuse*, I want to address here a few intrafamilial abuse aspects of school personnel awareness of a child's sexual behavior. First, with elementary school-age children, atypical sexual behavior (i.e., child-to-child sexually aggressive actions) observed or discovered by school personnel *may* be indicative of sexual abuse in the home, and school protocols should be available to guide teachers on how to respond to such observations. Second, a school may become aware that a young child has a disease that could only be sexually transmitted, which is even more indicative of possible sexual abuse in the home or elsewhere. School personnel should have protocols for handling such situations.

Sexual activity among junior high and high school-age children, however, should not be considered a suitable subject for CPS consideration and intervention. I am unaware of any State legislature that clearly intended its mandatory child abuse reporting laws to cover childhood sexual relationships with older persons *per se.* Even though a minor's intimate involvement with an older teenager or adult may suggest that a statutory rape or unlawful sexual conduct offense has been committed, school personnel need policy guidance on what to do about such knowledge. Such policies must recognize that the reporting, as child abuse, of one child's sexual activity may have a profound, negative influence on other children seeking out sex-related counseling and medical assistance.

ADDRESSING EXTRAFAMILIAL AND SCHOOL-BASED ABUSE

The language of many State child abuse laws has long aided confusion over whether suspicions that a child may have been abused by someone *other* than a parent, guardian, or other adult legally responsible for their care should be communicated to CPS under mandatory reporting laws. There will always be situations where school personnel suspect a child has been abused by an adult, but are uncertain who inflicted such harm. In such situations, a report to CPS would never be inappropriate, and school policies should so advise. Most States now have reporting laws that trigger reporting responsibilities in cases of abuse by any person "responsible for a child's welfare" or who has "care, custody, or supervision" of a child. Do school teachers fall under these categories? What about school bus drivers or school janitors? Should a CPS agency's Central Registry record system include and maintain abuse report information concerning such personnel? These are issues that school attorneys must explore, and which may require outside legal consultation and opinions.

Clearly, one valid purpose of the broadened reporting laws is to help assure that law enforcement agencies are made aware of all serious physical abuse, and sexual abuse or exploitation, of children that occurs outside of their homes. The central policy question for school officials is: Should CPS be involved in the receipt or investigation of such reports, especially when the suspected perpetrator is a school employee or volunteer? The most widely held view, which I share, is that CPS should play no role in extrafamilial abuse cases, with some narrow exceptions (e.g., where gross parental negligence appears to have been a contributing factor in the out-of-home abuse, or where parental response to the reported abuse suggests that they may inhibit the child's services and treatment). Of course, CPS personnel can be helpful, and should be involved, for training staff of other agencies in the process of investigating and documenting abuse cases, interviewing children and parents, and in identifying therapeutic resources for abused children and their families.

When State law provides for CPS to respond to cases of alleged abuse of children by school personnel, it sets up a conflict situation that can inhibit good CPS-school relations in intrafamilial abuse cases. Therefore, where statutes now provide for routine CPS involvement in school personnel child abuse investigations, State and local educational officials should consider the development of remedial legislation. Lawmakers should assure that limited CPS resources are focused on troubled *families*, not on addressing criminal assaults of children by educational system employees.

No topic of this publication is more comprehensively addressed elsewhere in the text than the school's handling of alleged cases of abuse of students by school personnel. Clearly, the preceding chapters should make it clear to the reader that school districts must have clear written protocols for: (a) the internal investigation of such cases, as well as for cooperation with outside authorities that are so involved; (b) the process of coordinating personnel administrative disciplinary hearings with criminal and other judicial proceedings; and (c) the reporting of the identity of alleged and confirmed offenders at the appropriate local, State, and national levels.

There can be no doubt that society views the abuse of children by school personnel as abhorrent and a most severe violation of trust. Thus, I support: (a) the trend in laws and court decisions that clearly makes any teacher-student sexual contact, on or off school grounds (and even where the school employee was not "on duty" at the time of the sexual encounter) a criminal offense and grounds for professional disciplinary sanctions; and (b) the movement to prohibit physical assaults of schoolchildren by teachers through State legislative reform that outlaws the use of corporal punishment. I also favor laws and school board policies that require prompt reporting of *all* school personnel-related substantiated abuse and related criminal convictions, as well as pending charges, to appropriate State educational agencies, credentialing bodies, and State and national registries (such as the National Association of State Directors of Teachers Education and Certification [NASDTEC] Educator Identification Clearinghouse). Educational professionals must get the message: "One strike and you're out" of the field of education.

The present capability of the NASDTEC national clearinghouse is limited by only including teacher certificate revocations and denials, its use being completely voluntary, its data base not being in a national on-line system easily accessible for both input and information retrieval at the State and local educational agency level, and the fact that it is not a fingerprint-based system (since disciplined teachers may apply in other school systems under aliases). Once a teacher has been found to have physically abused or a uniform system in place nationally that virtually assures the cessation of their teaching career.

Abuse accusations against school employees present several other legal problems discussed in earlier chapters. With regard to the reporting of employees who are alleged perpetrators of child abuse, a critical issue to resolve is whether only a student *accusation* should trigger notifications to those at the State educational agency and teacher credentialing levels. Also, should legislation prohibit school system use of "confidential settlement agreements" in cases where allegations either did, or did not, result in judicial or administrative factual findings of abuse? Should it be lawful for a school to permit an abusive employee to transfer to another school or school system, simply because there was never a formal hearing and adjudication?

These questions suggest the importance of making a record, through the administrative or judicial hearing process, that establishes the precise nature of any employee's offensive conduct. Once there is a clear record of the facts, schools can take appropriate action with greater confidence that their responses will survive legal challenge. Until the hearing process is complete, or there is an admission by the employee of the truth of the allegations, laws should give schools clear authority — regardless of any language in collective bargaining agreements that may suggest otherwise — to place accused personnel on paid, or unpaid, suspension or otherwise place them in interim positions where they will have no direct, unsupervised, contact with students.

THE SCHOOL'S ROLE IN PREVENTING CHILD ABUSE

There are two major areas of school investment in child abuse prevention. The first is abuse awareness education, and follow-up support, for students and school personnel. The U.S. Advisory Board on Child Abuse and Neglect has suggested that schools have the potential to be the "linchpin of community-based efforts to protect children from maltreatment" (*Creating Caring Communities*, the 1991 Report of the Board, at 86; see excerpt at 135-137, *infra*.). In that regard, over the past decade schools have adopted child sexual abuse education programs reaching hundreds of thousands of students, activities that — if they accomplish nothing else — lead students to report child abuse that is happening to them or others, thus helping to prevent continued victimization.

School boards need to support such student educational efforts, while at the same time providing training for school personnel on how to properly handle the abuse disclosures (both intrafamilial and extrafamilial) that inevitably follow such curricula, special programs, assemblies, publication of written pupil material, etc. Schools can further work to prevent child maltreatment by: (a) assisting students in their socialization process into adulthood (e.g., through marriage, parenting, and "family life" education programs); (b) offering support services for families under stress; (c) making the schools "centers of child advocacy" generally; (d) providing services (including support groups) to maltreated children who are part of the school community; and (e) establishing, and communicating to all school personnel, clear guidelines on physical contact with students.

The second major prevention area is more effective screening of school personnel (and those working in school-based programs) through scrupulous reference/prior employer checking and criminal record identification. A 1990 report from the Children's Defense Fund found that 59% of States fully or partially exempted child care programs operating in public schools from criminal record check requirements. More diligent efforts are needed in such areas as: (a) having questions on job and volunteer applications, that must be answered under oath, pertaining to criminal records, child abuse, drug use, and any prior suspensions or dismissals in positions working with children; (b) requiring all applicants to submit a set of fingerprints along with their application; and (c) making inquiries, where available, from State Child Abuse Central Registries and State Sex Offender Registries.

School boards also need policies clarifying which applicants, and present personnel, will be required to undergo background screening, what that screening shall consist of, how different types of negative information will be used in personnel decisions and the process those affected must follow in challenging the use of such information, and who will bear the costs of the screening process. School boards and their attorneys must become familiar with the National Child Protection Act of 1993, Pub. L. 103-209, a federal law intended to enhance the background check system that child caring organizations, including schools, may be required to use for prospective, and current, job applicants and volunteers pursuant to State law.

Another child abuse and neglect prevention-related issue, not covered elsewhere in this publication, relates to: (a) the prevention of abduction, or repeat abduction, of children by family members; and (b) the location and recovery of children abducted by family members. Children who are victims of custodial interference by means of abduction and secretion (also known as parental kidnapping) can suffer significant psychological abuse. Sometimes, such children may also become victims of physical or sexual abuse, and severe neglect. The very act of forcible child abduction, even by a trusted and loved family member, is an act of child abuse.

Where parents are divorced or separated, and school personnel become aware of a danger to the child of possible abduction by a noncustodial parent, school board policy should provide that custodial parents be requested to provide certified copies of the child custody decree for placement in the child's school files, and (if the parent so requests) copies should be given to the child's teachers. Some custody decrees may actually state that the child's school is prohibited from releasing the child to the noncustodial parent without the custodial parent's prior consent. The child's custodial parent should be alerted immediately if the noncustodial parent makes any unscheduled visits to the school or attempts to leave school property with the child. School principals need clear policy guidance on when children can leave school in the care of a noncustodial parent, or for that matter any person not the child's custodial parent.

School boards and their attorneys also must be aware that numerous States have enacted statutes regarding the "flagging" of school records of missing children. Such laws generally require law enforcement agencies to notify the school that the child last attended of his disappearance. The school must then make a notation in the child's records to that effect. When a request is later made by another school, or individual, for those records, the school holding the records is then obligated to notify law enforcement as to the identity of (and any contact information regarding) the requesting party (who may, of course, be an abducting parent). The school may be further obliged to hold on to the records until directed otherwise by the police. These flagging statutes have been promoted by the National Center for Missing and Exploited Children and in a recent report to Congress from the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (*Obstacles to the Recovery and Return of Parentally Abducted Children*, 1993).

Finally, a few other thoughts about school responsibility for child abuse prevention. School boards should determine whether there are any current system-wide protocols for responding to cases of abuse of school children by other students — the nature of which may suggest that the child-perpetrator is an abused child. The issue of student-on-student violence has been briefly covered elsewhere in this publication, but only in the context of school liability. I would like to see State laws require school systems to have procedures for addressing student vs. student physically and sexually assaultive conduct (both on and off school property). "Bullying" may have at its roots the severe parental abuse or neglect of the bully, and it may profoundly affect far more child victims than those ever subjected to intrafamilial maltreatment.

There are a number of steps that schools can take to squarely address child-to-child violence and help prevent its reoccurrence. These include: (a) taking such violence, whether in the classroom, in the corridors, or on the playground, very seriously; (b) using outreach personnel to make connections with parents of assaultive students and to inform them of how the school will respond to such continuing behavior; (c) teaching children conflict resolution techniques, using supervised peer mediation to resolve disputes among children, and offering violence prevention classes and focus groups; and (d) reviewing cases of child-on-child violence carefully to see which warrant the offending child's referral to the juvenile court, or the child's family to a social services agency.

MAKING THE SCHOOLS A RESOURCE FOR THE TREATMENT OF ABUSED CHILDREN

Schools are an underutilized resource for the treatment of abused children. Help can begin by making the school's own response to a child's disclosure of abuse a more humane one. Laws and school policies should, for example, provide for the protection (e.g., control of harassing and intimidating questioning, safeguarding the privacy of a child's therapy records in the possession of the school) of child victims involved with school-based personnel administrative hearings related to accusations of abuse. Laws can also help assure that the treatment costs of child abuse victims will be covered by school-based offenders, or their insurers. Ideally, State statutes would provide for a civil cause of action for all minor victims of sexual abuse, and clearly specify that no intent to harm the victim need be established for liability to attach.

Earlier in this publication, the issue was raised of the federal Hatch Amendment (20 U.S.C.§1232h) that restricts psychological examinations, testing, or treatment for students, absent written parental consent. School boards should examine, and find ways of overcoming, any possible negative interpretations or consequences of that Amendment in connection with school support for the evaluation and treatment of abused children. That Amendment certainly was never intended to, and should not, interfere with the authority or ability of schools to provide diagnostic, counseling, and peer support services to abuse victims.

Another federal law affecting schools' approaches to meeting the treatment needs of abused and neglected children is the Individual with Disabilities Education Act (IDEA). When should child maltreatment trigger consideration by the school of an evaluation, or re-evaluation, of the child's special education needs? What agencies involved in services to a maltreated child and family should be consulted in the school's development of an Individualized Education Plan (IEP) for the child? What should the school do when a parent who is the subject of a substantiated case of child abuse or neglect refuses to cooperate in the development of that Plan, or with the service providers? What about situations where maltreated children have been placed in foster care or are otherwise in the legal custody of the State or county?

This latter question raises important legal issues related to the school's fulfillment of the expectations of federal Pub. L. 96-272: specifically that all foster children for whom child welfare agencies receive federal support must have current educational information in the child's case record. The placement of children in State or county care also raises the issue of when "surrogate parents" will be appointed to assist the child in the development of an IEP under the IDEA. These are all questions with complex legal significance, and space does not permit an analysis of these matters here. Readers are advised to consult with both special education and child abuse authorities on such issues.

A few last points. Many child protection authorities believe, as does the U.S. Advisory Board on Child Abuse and Neglect, that America's schools can and should do far more in response to child maltreatment than has been detailed here. At the conclusion of this chapter are the Board's findings and recommendations in this regard. They have significance for federal, State, and local educational agency action. Finally, we must remember that not only abused students and their family members have treatment needs. Many teachers are themselves adult survivors of childhood abuse. What will school authorities do for them when contact with a maltreated child triggers their own memories of earlier trauma? School board personnel must never forget that dealing with abused children and their families is extraordinarily difficult work. School system human resource personnel should be prepared to address the pain of school-based personnel's own abuse histories and help them obtain needed assistance. Even where a teacher has no personal history of abuse, the death of one of their students due to abuse may precipitate an intense emotional crisis — one to which their employers should be quick to sensitively respond.

CONCLUSION

The U.S. Advisory Board on Child Abuse and Neglect has a vision of far more active school system involvement in the identification, intervention, prevention, and treatment of abused and neglected children. That vision can only become a reality if local school boards, and their national organization, call for greater educational program investment on these child protection topics by government officials at the State and federal levels. In 1991 the Board noted a survey of the Federal Inter-Agency Task Force on Child Abuse and Neglect that found within the entire U.S. Department of Education only one project on abuse and neglect of school-aged children, only two projects on service delivery for abused and neglected preschool children, and no national standards for data collection within the schools on child maltreatment. Inquiries of State educational agencies might produce similarly disheartening findings.

It would be difficult, even today, to dispute: (a) the Board's 1990 Report observation that schools too often fail to provide sufficient support for maltreated children; or (b) the Board's 1991 Report observations that many schools impose administrative obstacles to child abuse reporting, and that they operate completely outside of the multidisciplinary child protection system. The Board has also noted that the educational system has never been given the resources required to realize its potential role in addressing the needs of maltreated children. With the leadership and support of local school boards, neighborhood schools can become major vehicles through which the Board's vision of a non-stigmatizing alternative to the current accusation-based system — of "neighbor helping neighbor" to look out for the protection and welfare of the community's children — can be realized.

CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY

August 1990

The U.S. Advisory Board on Child Abuse and Neglect

STRENGTHENING THE ROLE OF THE SCHOOLS IN CHILD PROTECTION

Because of their universality and access to children, the schools are an obvious setting for the prevention, identification, and treatment of child maltreatment. Unfortunately, the educational system has neither been seen as an essential part of a multidisciplinary approach to the protection of children, nor been given the resources to realize this potential.

Although sexual abuse prevention education is now available for hundreds of thousands of children in American schools,[91] and many PTAs have diffused knowledge about child abuse and management of family stress, such efforts have rarely been comprehensive. Many schools remain uninvolved in family life education and support for families at risk.[92] As of 1986, school personnel still reported only one-quarter of cases of child maltreatment they identified, and many schools continued to impose administrative obstacles to reporting.[93] Schools often have failed to provide sufficient support for maltreated children,[94] who commonly exhibit adjustment problems at school as well as at home.[95]

Schools can participate in the prevention of child maltreatment by providing sex abuse education programs, offering comprehensive family life education both to children and parents, and sponsoring support groups for families-at-risk as well as children-at-risk. Schools can assure that all children who are suffering from maltreatment are identified and promptly reported to proper authorities. Schools, utilizing the skills of school nurses, school psychologists, and school social workers, can help provide treatment to abused and neglected children and their families.

Schools can become major vehicles for the expression by neighborhoods and communities of their concern and support for the well-being of families and children. For schools to accomplish each of these tasks they will require greater leadership from their schools boards, PTAs, Federal, State, and local governments, technical assistance from educational organizations, and considerably enhanced financial resources.

RECOMMENDATION #29

The Secretary of Education and his counterparts in State and local educational agencies, in concert with the leaders of all relevant national educational organizations and their State and local affiliates, should launch a major initiative to establish and strengthen the role of every public and private school in the nation in the prevention, identification, and treatment of child abuse and neglect.

END NOTES

93. *National Center on Child Abuse and Neglect, Study Findings: Study of the National Incidence and Prevalence of Child Abuse and Neglect* (1988), at 6-17.

94. *See generally* S. Apter & J. Conoley, *Childhood Behavior Disorders and Emotional Disturbance* (1984) (showing the relationships among school, family, and child disturbance).

95. M. Wald, J. Carlsmith, & P. Leiderman, *Protecting Abused and Neglected Children* 34 (1988).

CREATING CARING COMMUNITIES: BLUEPRINT FOR AN EFFECTIVE FEDERAL POLICY ON CHILD ABUSE AND NEGLECT

Second Report

The U.S. Advisory Board on Child Abuse and Neglect

September 15, 1991

STRENGTHENING THE ROLE OF ELEMENTARY AND SECONDARY SCHOOLS IN THE PROTECTION OF CHILDREN

The Federal Government should take all necessary measures to ensure that the nation's elementary and secondary schools, both public and private, participate more effectively in the prevention, identification, and treatment of child abuse and neglect. Such measures should include knowledge building, program development, program evaluation, data collection, training, and technical assistance. The objective of such measures should be the development and implementation by State Educational Agencies (SEAs) in association with Local Educational Agencies (LEAs) and consortia of LEAs, of:

- inter-agency multidisciplinary training for teachers, counsellors, and administrative personnel on child abuse and neglect;
- specialized training for school health and mental health personnel on the treatment of child abuse and neglect;
- school-based, inter-agency, multidisciplinary supportive services for families in which child abuse or neglect is known to have occurred or where children are at high risk of maltreatment, including self-help groups for students and parents of students;
- family life education, including parenting skills and home visits, for students and/or parents; and
- other school-based inter-agency, multidisciplinary programs intended to strengthen families and support children who may have been subjected to maltreatment, including school-based family resource centers and after-school programs for elementary and secondary school pupils which promote collaboration between schools and public and private community agencies in child protection.

The Board believes that the educational system has the potential to be the linchpin of community-based efforts to protect children from maltreatment. It is in the nation's best interest, both in economic and human terms, that schools assume this role to a greater degree than they have done in the past.

National survey data show that far too often school personnel still do not report suspected child abuse and that many schools continue to impose administrative obstacles to reporting. Moreover, schools in some cases operate completely outside of the multidisciplinary child protection system and are often distrustful of the system's response to child maltreatment. Too often, schools have failed to develop the resources needed for emotional support of pupils and for assistance to troubled families of schoolchildren.

Such behavior sometimes occurs as a result of frustrating experiences with reporting in the past. In some cases school personnel may not have been provided the information or resources necessary to realize their collaborative potential. Also, many schools must focus their limited resources on basic safety issues related to community violence.

If schools are to assume a more proactive posture in the prevention, identification, and treatment of child abuse and neglect, the effort will need to involve school administrators, teachers, educational organizations, parent-teacher organizations, and parents. It will also require the active understanding and collaboration of elected officials, public and private service providers, businesses, and other appropriate community-based organizations.

The value of such collaboration can be seen in the small but growing number of programs throughout the nation in which health and social services are being effectively provided to young people by means of coordination between school systems and the agencies which provide these services. Often services are provided directly in the school. This kind of coordination shows much promise and should be encouraged, particularly in disadvantaged communities where it does not now exist.

Critical to the schools playing a larger role in child protection is Federal support to assist in building the schools' capacity to fulfill such a role. In the Task Force's survey of Federal involvement in child protection, the Department of Education reported only one project (a discretionary research grant) on abuse and neglect of school-aged children and two demonstration projects on service delivery for abused and neglected preschool children.

Even more significantly, there is no national standard for data collection within schools on child maltreatment. The Federal Government, therefore, knows very little about the programs and procedures for identifying child abuse and neglect in school settings across the nation, the effectiveness of these programs, and the nature and extent of school-identified maltreatment.

Traditionally, American society has expected the family unit to raise, nurture, and motivate children to become confident, caring adults. While the Board believes that families must retain the primary responsibility for childrearing, a growing number of families need support. Because of their universality and access to children, elementary and secondary schools are well structured to provide such assistance in an easily accessible, non-stigmatizing manner. They cannot, however, be expected to take on extensive family support responsibilities without additional funding and professional back-up.

OPTIONS FOR ACTION

- **SECRETARY OF EDUCATION:** Direct appropriate components of the Department to develop protocols for child abuse reporting, case management, resource referral, interagency case management, and maintenance of data management information systems within SEAs and LEAs.

- **SECRETARY OF EDUCATION:** Direct appropriate components of the Department, in collaboration with appropriate components of DHHS, to provide technical assistance to the SEAs, based on such protocols, in the development of child abuse prevention and intervention programs in LEAs.

- **SECRETARY OF EDUCATION:** Direct appropriate components of the Department, in collaboration with NCCAN and the Office of National Drug Control Policy, to develop and distribute model curricula for grades K-12 that include alcohol and substance abuse prevention, understanding child abuse, and accessing community resources.

- **SECRETARY OF EDUCATION:** Direct appropriate components of the Department to develop a national data collection system — sensitive to the protection of confidentiality — to monitor and evaluate implementation of the protocols and to track numbers of reports and their pattern over time within school districts and entire States. These data would include, at a minimum, the number of reports made by schools each year, categorized by types and severity of maltreatment alleged. A more comprehensive system would include data on victim age, sex, and ethnicity, as well as data on follow-up, outcome, and interagency involvement in each case. (The system should be coordinated with the activities called for in Recommendation E-1.a).

- **SECRETARY OF EDUCATION:** Direct appropriate components of the Department, in collaboration with appropriate components of DHHS, to undertake an initiative aimed at encouraging State, Tribal, and local school, health, and social services officials to increase the number of coordinated service delivery programs aimed at adolescents.

- **CONGRESS:** Establish a program of grants for the development and implementation of school-based efforts to address child maltreatment. Funds would be allocated by formula to SEAs which would then distribute them competitively to LEAs and consortia of LEAs. SEAs would retain a limited percentage of funds for the cost of providing technical assistance to LEAs and consortia of LEAs and for statewide inter-agency multidisciplinary training of school personnel. This program would be administered by the Department of Education, in collaboration with DHHS, or vice versa. Program collaboration should also include, where applicable, Bureau of Indian Affairs-operated schools.

- **CONGRESS:** Establish a program of grants for the development and implementation of public-private school-based efforts which focus on bringing community resources and services — including child care centers for teen mothers as well as relevant parent support/education services — into the schools to serve at-risk children and their families.

- **CONGRESS:** Establish a program of special grants for the employment of psychologists and social workers (including masters-level psychologists and social workers) by schools in rural areas heavily populated by Native American children as well as on reservations for the purpose of providing treatment services to maltreated children.

NEIGHBORS HELPING NEIGHBORS: A NEW NATIONAL STRATEGY FOR THE PROTECTION OF CHILDREN

Fourth Report

U.S. Advisory Board on Child Abuse and Neglect

September 1993

THE SCHOOLS

In its 1991 report, the Board noted the virtual vacuum in child protection efforts in the U.S. Department of Education.[272] Analogously, researchers have found underreporting of suspected child maltreatment to be especially acute in the schools.[273]

The Board continues to believe, however, that "the educational system has the potential to be the linch-pin of community-based efforts to protect children from maltreatment."[274] Schools play a key role in determining the quality of the social environment in neighborhoods, for both children and their parents. Indeed, they often serve as the center of the community, particularly in rural areas. As a result, school issues and activities often bring the community together in ways that nothing else does.

Moreover, there are signs that professionals in education are ready to assume a larger role in child protection. Many schools have adopted child sexual abuse education programs.[275] Although the effectiveness of this approach is controversial,[276] it does indicate the willingness of schools to assume a larger role in the prevention of child abuse and neglect.[277] So too does the creative response by some schools to the need to build supportive networks for children and families.

Florida, along with a number of other states, is funding "Full Service Schools" which are evolving locally through interagency collaboration to meet local education, medical and/or, social and human service needs of children and youth and their families. The idea is to bring needed services onto or near the school grounds to be easily accessible. Full service schools are seen as potential one stop shopping centers for students and their families. Community and parent involvement in setting priorities and developing services is an important part of this effort. It is hoped that this will improve school community relations so that families will support the school's mission, and that schools in return, will support the family's mission.[278]

In New York State, the Liberty program uses interdisciplinary teams to provide special attention to children and families at high risk. And through the Community Lifelines prevention demonstration project funded by NCCAN, four schools in Elmira, N.Y. are experimenting with part-time outreach workers who serve as parent partners — an inexpensive but effective means of involving parents in building a sense of community and support for each other through child- and parent centered activities based at the school. Schools in Elmira and Cortland, N.Y. also have succeeded in gaining the cooperation and involvement of parents of children with academic and emotional problems (including problems arising from maltreatment) by reaching out effectively and by marketing special activities as privileges rather than a stigma.

Although such programs still are not as common as they should be, there has been a growth in school-based health, mental health, and social service programs — often through partnerships between schools and community agencies.[279] Indeed, one of the products of school restructuring in some States has been the development of "full-service" schools equipped to meet children's social and emotional needs as well as their cognitive needs.[280] When such a development occurs with an emphasis on neighborhood and parent involvement, it can result in strengthened neighborhoods and families — important results for the prevention of child maltreatment — as it offers support to children and youth that is likely to be therapeutic when maltreatment has occurred and, in the long term, preventive of maltreatment when children grow up to be parents themselves.

In a growing number of Counties in New York State, local departments of social services are placing workers in the schools. These workers visit families and children when problems first surface — long before they become serious enough to justify a CPS hotline report. As a result, DSS officials are reporting reduced foster care placement rates, and school officials are noting fewer behavior problems and better academic achievement. Apparently the program is averting problems that might have led to child maltreatment and the fear and humiliation involved in CPS investigations.

Although recognition and acceptance of their role in child protection are first steps that are yet to be achieved in some schools, the obstacle for many educators may be a lack of knowledge about how to fulfill a broader role. Among the various roles that schoolteachers might play in child protection, none is more widely endorsed by them than "providing support, encouragement, and understanding to children who have been abused," but teacher training remains limited largely to identification and reporting.[281] Similarly, many educators believe that they lack skills or time to involve parents whom they regard as unresponsive. Therefore, an important element in development of school-based programs for prevention and treatment of child abuse and neglect should be training, with emphases on support for child-ren who may have been traumatized and on development of partnerships with parents who may have had minimal formal involvement in their children's education.

Whatever the specific focus of school programs, an important step is to go beyond the "we-they" view of parents. Although school staff often complain about parents who "don't care" about their children, some of these parents say that the school makes them feel uncomfortable. Many themselves have had bad experiences in school, and they are hardly eager to return. Such feelings often evaporate when someone — a teacher, a principal, a counselor, a nurse, or an out-reach worker — takes the time to contact parents personally and positively. As an example, one teacher made it a point to contact every parent in her class over several weeks to tell them of something positive their child was doing. For most parents this was a new, and very welcome experience which made them feel closer to the school.

END NOTES

272. *Creating Caring Communities*, *supra* note 7, at 86.

273. *National Center on Child Abuse and Neglect, Study Findings: Study of the National Incidence and Prevalence of Child Abuse and Neglect* 6-17 (1988).

274. *Creating Caring Communities*, *supra* note 7, at 86.

275. *See, e.g.*, Jill Duerr Berrick & Neil Gilbert, *With the Best of Intentions: The Child Sexual Abuse Prevention Movement* 16-29 (1991) (describing the implementation of the Maxine Waters Child Abuse Prevention Training Act).

276. For diverse interpretations of research on point, see, e.g., Berrick & Gilbert, *supra* note 273; Sandy K. Wurtele & Cindy L. Miller-Perrin, *Preventing Child Sexual Abuse: Sharing the Responsibility* (1992); David Finkelhor & Nancy Strapko, *Sexual Abuse Prevention Education: A Review of Evaluation Studies*, in Prevention, *supra* note 256, at 150; Gary B. Melton, *The Improbability of Prevention of Sexual Abuse, in* Prevention of Child Maltreatment, *supra* note 256 at 168; N. Dickon Reppucci & Jeffrey J. Haugaard, *Prevention of Child Sexual Abuse: Myth or Reality?*, 44 Am. Psychologist 1266 (1989).

277. Schools can work to prevent child maltreatment by assistance with socialization into adulthood (e.g., parenthood education), support for families under stress, advocacy for children, and support for maltreated children. Garbarino & Gilliam, *supra* note 255, at 97-105.

278. Interagcy. Workgrp. on Full Serv. Schools, Dep'ts of Educ., Health & Rehab. Servs., & Labor & Employ. Security, Florida Full Service Schools, Concept Paper (Feb. 1993); Orange County, Fla. Pub. Schools, Full Service Schools: Summary of Activities (1993).

279. *See, e.g.*, Jane Knitzer et al., *At the Schoolhouse Door: An Examination of Programs and Policies for Children with Behavioral and Emotional Problems* (1990); Atelia I. Melaville et al., *Together We Can: A Guide for Crafting a Profamily System of Education and Human Services* (n.d.) (report of task force sponsored by the Office of Educational Research and Improvement, U.S. Department of Education, and the Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services); Howard S. Adelman & Linda Taylor, *Mental Health Facets of the School-Based Health Center Movement: Need and Opportunity for Research and Development*, 18 J. Ment. Health Admin. 272 (1991); Joy G. Dryfoos, *School-Based Social and Health Services for At-Risk Students*, 26 Urb. Educ. 118 (1991).

280. *See, e.g.*, Cal. Educ. Code §§ 8800-8807 (West 1993); Cal. Welf. & Inst. Code §§ 4343-4352 & 4370-4390 (West 1993); Fla. Stat. Ann. § 402.3026 (West 1993); Ky. Rev. Stat. Ann. § 156.497 (Baldwin 1993).

281. Nadine Abrahams et al., *Teachers' Knowledge, Attitudes, and Beliefs about Child Abuse and Its Prevention*, 16 Child Abuse & Neglect 229, 232 (1992). Reporting of child maltreatment by teachers does remain often inadequate, but that particular problem seems more related to systemic policies and practices than a deficit in training. Most teachers do report suspected child maltreatment, but they commonly make their reports to school personnel (e.g., principals) rather than the legally designated authorities. *Id.* at 233.

Appendix A-1

SAMPLE POLICY

ANCHORAGE SCHOOL DISTRICT CHILD ABUSE AND NEGLECT REPORTING PROCEDURES*

I. PROVISIONS OF LAW

A. Introduction.

School teachers, administrative staff members, practitioners of the healing arts, and others, are required by law to make reports when they have reasonable cause to suspect that child abuse or neglect has resulted in harm to a child. This obligation is an individual's legal duty. The procedures and definitions provided below are designed to assist all school district employees in fulfilling their obligations under this law.

Reports must be made by telephone, followed by a written report, to the Division of Family and Youth Services (D.F.Y.S.) whenever there is reasonable cause to suspect that a child has suffered abuse or neglect. It is essential that all school district employees familiarize themselves with the reporting requirements and definitions set forth below. A working knowledge of these definitions and requirements will enable you to comply with your legal duties in fulfilling these challenging obligations.

B. The Reporting Requirement.

Employees of the district as listed below in Section II, are required by law and Board Policy to immediately report to the nearest office of the Department of Health and Social Services, Division of Family and Youth Services (D.F.Y.S.), instances where, in the performance of their professional duties, they have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect. If an employee making a report of harm cannot reasonably contact the nearest office of D.F.Y.S., and immediate action is necessary for the well-being of the child, the employee shall make the report to a peace officer. (AS 47.17.010)

C. Immunity. (AS 47.17.050)

AS 47.17.050 explains the immunity provisions for reporting.

D. Failure to Report.

Penalty for Failure to Report (AS 47.17.068). A person who fails to comply with provisions of AS 47.17.020 or 47.17.023 and who knew or should have known that the circumstances gave rise to the need for a report, is guilty of a class B misdemeanor.

II. PERSONS REQUIRED TO REPORT (AS 47.17.020)

A. School teachers and school administrative staff members.

B. Practitioners of the healing arts, chiropractors, mental health counselors, dental hygienists, dentists, health aides, nurses, nurse practitioners, occupational therapists, occupational therapy assistants, optometrists, osteopaths, naturopaths, physical therapists, physical therapy assistants, physicians, physicians' assistants, psychiatrists, psychologists, psychological associates, audiologists (licensed under AS 08.11), hearing aid dealers (licensed under AS 08.55), religious healing practitioners, acupuncturists and surgeons.

C. Others, as identified by Alaska statute. (AS 47.17.020(a))

D. SPECIAL NOTE: In order to protect children, other district employees even though not required by law to report suspected child abuse or neglect are required to report to their supervisors or the principal situations where they have reasonable cause to suspect child abuse or neglect. The supervisor or principal shall report to D.F.Y.S.

III. DEFINITIONS

A. "Child abuse or neglect" (AS 47.17.070(2)) means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child's health or welfare is harmed or threatened thereby.

B. "Neglect" (AS 47.17.070(6)) means the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter or medical attention for a child.

C. "Immediately" (AS 47.17.070(12)) means as soon as is reasonably possible, and no later than 24 hours.

D. "Criminal negligence" has the meaning given in AS 17.81.900 (AS 47. 17.070(11)).

E. "Maltreatment" means an act or omission that results in circumstances in which there is reasonable cause to suspect that a child may be a child in need of aid, as described in AS 47.10.010(a)(2), except that for purposes of this chapter, the act or omission need not have been committed by the child's parent, custodian or guardian.

F. "Mental injury" means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment in the child's ability to function in a developmentally appropriate manner.

G. "Reasonable cause to suspect" means cause, based on all the facts and circumstances known to the person, that would lead a reasonable person to believe that something might be the case (AS 47.17.070(14)).

IV. REPORTING PROCEDURES

A. Any district employee required by law to report having reasonable cause to suspect that child abuse or neglect as defined by state statutes has occurred shall follow these procedures in reporting abuse or neglect:

1. Make a telephone report to the Division of Family and Youth Services (D.F.Y.S.):
   - 276-1486 for Anchorage Reports
   - 694-9546 for Eagle River Reports.

2. Request an intake case worker or screener. Obtain the name of the case worker, note the time and date the call was made and enter these on the written report form.

3. Report the injury or circumstances, and any other pertinent information related to the cause, source, frequency or duration of the child abuse or neglect, including a description of the home situation, if known.

4. State your name, title and school. You also may indicate whether your name may or may not be used by D.F.Y.S. during any investigation.

5. If there is a problem contacting D.F.Y.S. immediately, notify the principal/administrative designee. If immediate action is necessary for the well-being of the child, make a telephone report to the police department: 786-8500 (for Anchorage reports) or 694-2715 (for Eagle River reports), or 269-5511 (Alaska State Troopers). The principal may contact an ASD supervisor to seek additional assistance in contacting a D.F.Y.S. case worker or supervisor.

6. *The employee shall inform the principal or supervisor when a report has been made to D.F.Y.S. or the police department.*

7. *SPECIAL NOTE: If an employee is unsure about the need to report possible child abuse or neglect, the employee shall immediately contact D.F.Y.S. to report concerns.*

8. SPECIAL NOTE: AS 47.17.064(a) provides that: a practitioner of the healing arts may, without the permission of the parents, guardian, or custodian, take the following actions with regard to a child who the department or practitioner has reasonable cause to suspect has suffered physical harm as a result of child abuse or neglect: (1) take or have taken photographs of the areas of trauma visible on the child; and (2) if medically indicated, have a medical or radiological examination of the child performed by a person who is licensed to administer the examination.

B. Written Reports Required to D.F.Y.S.

Within 24 hours of making a telephone report of child abuse or neglect, the employee shall prepare a written report. The original copy shall be routed as follows:

1. for Anchorage reports:
   Division of Family and Youth Services
   550 West 8th Avenue, Suite 201
   Anchorage, Alaska 99501

2. for Eagle River reports:
   Division of Family and Youth Services
   Parkgate Building
   11723 Old Glenn Highway, #113
   Eagle River, Alaska 99577

The report shall be made on an official school district form available at the principal's office or from the central administration building. The report shall include:

1. The names and addresses of the child and the child's parent or guardian.
2. The child's age.
3. A description of the facts, injuries or circumstances giving rise to the reasonable cause to suspect that child abuse or neglect occurred or is occurring.
4. Any information that might assist in determining the cause of any injuries and the identity of persons responsible for causing harm to the child.
5. Any statements made by the child, including graphic quotes, if any.
6. The names of any other persons who may have information relevant to the child abuse or neglect.

7. The state or municipal agency to which the telephonic report was made, including the name of the person to whom the report was made, and the date and time of the telephonic report.

A copy of the report shall be routed to the principal. The principal shall sign the report and maintain a copy of it in a confidential file labeled, "Child Abuse and Neglect Referrals - Confidential." These reports will be maintained at the school for a minimum of seven years.

A notation of the report shall be made on the student's health card with a date and signature of the School Nurse. *For Example:* D.F.Y.S. Referral to: name of intake person or screener and date and signature.

C. Maintaining Confidentiality.

All school district employees are required to protect students' rights to privacy and confidentiality. As such, all information and reports regarding child abuse or neglect shall be treated as confidential and shall be maintained in a safe place. No employee shall make available, or allow access to this information by other students, staff or members of the public, except as required by school rule, Board Policy or law.

The principal shall maintain the confidentiality of all reports of child abuse and neglect received, other than making the reports available to the appropriate agencies to which the reports were initially made. The principal shall make provisions to protect, and to maintain as confidential, the identity of the employee or employees making the report.

V. STUDENT INTERVIEWS

Student interviews regarding child abuse and neglect must be conducted in accordance with Board Policy 471.4 and state law as per AS 47.17.027.

DUTIES OF SCHOOL OFFICIALS (AS 47.17.027)

(a) If the department or a law enforcement agency provides written certification to the child's school officials that (1) there is reasonable cause to suspect that the child has been abused or neglected by a person responsible for the child's welfare or as a result of conditions created by a person responsible for the child's welfare; (2) an interview at school is a necessary part of an investigation to determine whether the child has been abused or neglected; and (3) the interview at school is in the best interests of the child, school officials shall permit the child to be interviewed at school by the department or a law enforcement agency before notification of, or receiving permission from, the child's parent, guardian, or custodian. A school official shall be present during an interview at the school unless the child objects or the department or law enforcement agency determines that the presence of the school official will interfere with the investigation. Immediately after conducting an interview authorized under this section, and after informing the child of the intention to notify the child's parent, guardian, or custodian, the department or agency shall make every reasonable effort to notify the child's parent, guardian, or custodian that the interview occurred unless it appears to the department or agency that notifying the child's parent, guardian, or custodian would endanger the child.

(b) A school official who, with criminal negligence, discloses information learned during an interview conducted under (a) of this section is guilty of a class B misdemeanor.

VI. EMERGENCY CUSTODY

In any case where a representative of the Division of Family and Youth Services informs the district *in writing* that emergency custody of a student is being asserted pursuant to AS 47.10.142, the district shall immediately relinquish custody of the student to the representative of the D.F.Y.S.. In all such cases it shall be the responsibility of the D.F.Y.S. to notify the parent/guardian as soon as practicable that the D.F.Y.S. has assumed custody of the child.

VII. CHILD ABUSE AND NEGLECT TRAINING FOR PERSONS REQUIRED TO REPORT

The Anchorage School District will comply with the state law relative to training of employees in recognition of and reporting suspected child abuse and neglect.

TRAINING (AS 47.17.022)

(a) A person employed by the state or by a school district who is required under this chapter to report abuse or neglect of children shall receive training on the recognition and reporting of child abuse and neglect.

(b) Each department of the state and school district that employs persons required to report abuse or neglect of children shall provide (1) initial training required by this section to each new employee during the employee's first six months of employment, and to any existing employee who has not received equivalent training; and (2) at least once every five years, appropriate in-service training required by this section as determined by the department, or school district.

(c) Each department and school district that must comply with (b) of this section shall develop a training curriculum that acquaints its employees with:

(1) laws relating to child abuse and neglect;
(2) techniques for recognition and detection of child abuse and neglect;
(3) agencies and organizations within the state that offer aid or shelter to victims and the families of victims of child abuse or neglect;
(4) procedures for required notification of suspected abuse or neglect;
(5) the role of a person required to report child abuse or neglect and the employing agency after the report has been made; and
(6) a brief description of the manner in which cases of child abuse or neglect are investigated by the department and law enforcement agencies after a report of suspected abuse or neglect.

(d) Each department and school district that must comply with (b) of this section shall file a current copy of its training curriculum and materials with the Council on Domestic Violence and Sexual Assault. A department or school district may seek the technical assistance of the Council or the Department of Health and Social Services in the development of its training program.

* Adopted by Anchorage School Board, August 13, 1990

Appendix A-2

SAMPLE FORM

ANCHORAGE SCHOOL DISTRICT
REFERRAL FOR SUSPECTED CHILD ABUSE OR NEGLECT

Mail to: DIVISION OF FAMILY AND YOUTH SERVICES

550 W. 8th Avenue Suite 201 or Anchorage, AK 99501 Phone: 276-1450 Fax: 265-5073	11723 Old Glen Hwy. #113 Eagle River, AK 99577 Phone: 694-9546

Telephone Report made to: ____________________ on ____________________
(Name of Person/Title) (Date/Time)

OR messages left at ____
(Record the time each message is left for DFYS to return your call)

Name of student referred: ____

Birth date: __________ Race __________ Sex _____ Grade in school: ______________

Parent/Guardian names: ____

Home address: ____

Home phone: ________ Work phone(father) ________ Work phone(mother) _______

Name(s) of other sibling(s): ____

Observations and statements made by the student leading to the suspicion of abuse or neglect. Include time and date of alleged abuse, name of alleged abuser and relationship to student.

____

____

____

____

____

____

____

____

Is there a history of similar injuries? Yes____ When?____ No ____ Unknown_________

Written Report Completed and Mailed By: ________________________________
(Signature and Title)

On ______________ ______________________ ______________________
(Date/Time) (School Name) (School Phone)

Name of Reporter to remain confidential: Yes _____ No _____

To be completed by the Principal or Designee:
Principal/designee signature acknowledges this confidential referral to DFYS.

_______________________ _______________________
(Principal/Designee signature) (Title)

Distribute copies to:

1. Mail original to Division of Family and Youth Services
2. Copy to Principal's file on Child Abuse/Neglect —Confidential
3. School Nurse: record DFYS referral to name of screener on Health Record.

ASD Form #326 (Rev. 8/90) (*Do not place referral in student cumulative record; do not transfer this form*).

INSTRUCTIONS FOR COMPLETING REFERRAL FOR SUSPECTED CHILD ABUSE OR NEGLECT

Prior to completing this form, refer to the "Child Abuse and Neglect Reporting Procedures" approved by the School Board on August 13, 1990. Within 24 hours of making a telephone report of child abuse or neglect, the employee shall prepare a written report. The report shall be made on an official school district form available at the principal's office or from the central administration building.

The written report shall include:

1. The names and addresses of the child and the child's parent or guardian.

2. The child's age.

3. A description of the facts, injuries or circumstances giving rise to the reasonable cause to suspect that child abuse or neglect occurred or is occurring.

4. Any information that might assist in determining the cause of any injuries and the identity of persons responsible for causing harm to the child.

5. Any statements made by the child, including graphic quotes, if any.

6. The names of any other persons who may have information relevant to the child abuse or neglect.

7. The state or municipal agency to which the telephonic report was made, including the name of the person to whom the report was made, and the date and time of the telephonic report.

8. A copy of the report shall be routed to the principal. The principal shall sign the report and maintain a copy of it in a confidential file labeled "Child Abuse and Neglect Referrals - Confidential." These reports will be maintained at the school for a minimum of seven years.

9. A notation of the report shall be made on the student's health card with the date and signature of the School Nurse.

For Example: DFYS referral to *name of intake person or screener*, date, and signature of school nurse.

LEGAL DEFINITIONS FOR REPORTERS

1. "Child abuse and neglect"

Child abuse or neglect means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child's health or welfare is harmed or threatened thereby.

2. "Neglect"

Neglect means the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter or medical attention for a child.

3. "Mental injury"

Mental injury means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment in the child's ability to function in a developmentally appropriate manner.

4. "Maltreatment"

This means an act or omission that results in circumstances in which there is reasonable cause to suspect that a child is in need of aid, except that the act or omission need not have been committed by the child's parent, custodian or guardian.

5. "Mandated reporter"

The following persons who, in the performance of their occupational duties, have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to DFYS:

practitioners of the healing arts, school teachers and school administrative staff members, social workers, peace officers, administrative officers of institutions, child care providers, paid employees of domestic violence and sexual assault programs, paid employees of an organization providing drug and alcohol treatment.

6. "Reasonable cause to suspect"

This means cause, based on all the facts and circumstances known to the person, that would lead a reasonable person to suspect that something might be the case.

7. "Immediately"

This means as soon as is reasonably possible and within 24 hours.

8. "The Department"

This refers to the Department of Health and Social Services of which the Division of Family and Youth Services is a part. In AS 7.17, "Department" means DFYS.

Appendix A-3

SAMPLE POLICY

STUDENT WELFARE
(Reporting Child Abuse)

What Must Be Reported. Anyone having reason to believe that a child less than 18 years of age or any crippled or otherwise physically or mentally handicapped child under 21 years of age has suffered any wound, injury, disability or other condition of such nature as to reasonably indicate abuse or neglect of such child may report or cause reports to be made of such information.

Who Shall Report. Everyone should report suspicions of child abuse/neglect; under law all certified professional employees of the district *must* report cases. Any person who is required to make such reports of neglect may take or cause to be taken color photographs of areas of trauma visible on a child and if medically indicated, cause to be performed radiological examinations of the child.

What To Look For. Educators are in a unique position to identify and report suspected cases of abuse or neglect. Other than the child's parents or guardians, educators probably spend more time and have a greater chance to observe a child's behavior than any other person. There are a number of signs an educator may look for when considering the possibility of child abuse or neglect. The presence of one factor alone may not necessarily indicate abuse. If many are present the educator should seriously consider reporting his or her suspicions. Among the most common items which may indicate abuse or neglect are if the child:

- is habitually away from school or constantly late;
- arrives at school very early and leaves very late because he or she does not want to go home;
- is compliant, shy, withdrawn, passive, and uncommunicative;
- is nervous, hyperactive, aggressive, disruptive, or destructive;
- has unexplained injuries;
- has an inordinate number of "explained" injuries;
- complains about numerous beatings;
- is inadequately dressed for inclement weather;
- has soiled, tattered or improperly sized clothing;
- is dirty, smells, has bad teeth or hair falling out;
- is thin, emaciated and constantly tired;
- is usually fearful of other children and adults.

Educators might also be suspicious if the parents:

- show little concern for the child;
- do not respond to the teacher's inquiries and are never present for the teacher's visits or parents' night;
- take an unusually long amount of time to seek health care for the child;
- do not adequately explain an injury;
- are reluctant to share relevant information about the child;
- respond inappropriately to the seriousness of a problem;
- cannot be found;
- have unrealistic expectations for the child;
- were themselves abused or neglected as children;
- are usually antagonistic and hostile when talking about the child's health problems.

Clues such as those above can help an educator make an informed decision about reporting a case of suspected child abuse or neglect. Educators are not required, nor are they encouraged, to make a unilateral investigation in such cases, but they are required to report suspected abuse to the appropriate authorities whose responsibility it is to investigate.

Principals are directed to annually review the regulations with staff members.

Filing the Report. Suspected cases of child abuse/neglect are to be reported to the building principal who is responsible for filing the appropriate report form with the county welfare department and with the local police department. The report forms should be mailed to both offices unless the situation warrants immediate intervention, at which time a telephone call to the police and/or welfare department is required. One copy should be retained for the file. Oral reports should include the name and address of the child and his or her guardians; the child's age; the nature and extent of the injury and any evidence of previous injury; and any other helpful information.

All information must be kept confidential. Any person who permits or encourages the unauthorized dissemination of its content is guilty of a misdemeanor of the fourth degree. Failure to report may also result in a similar penalty.

School personnel should not pressure the child to divulge information regarding the injury or other circumstances surrounding the abuse or neglect.

Immunity. Persons reporting suspected abuse/neglect cases are immune from prosecution based on their referral through the school.

Welfare Department Report. The principal will receive a preliminary report including whether intervention is required. Investigations are normally conducted in 24 hours. The principal should report back to the teacher so that he or she is kept apprised of the child's condition.

SOURCE: Bay Village School District, Bay Village, OH
DATE: Prior to 1988

Appendix A-4

SAMPLE POLICY

NORTH SYRACUSE CENTRAL SCHOOL DISTRICT PROCEDURES REGARDING CHILD ABUSE AND NEGLECT

It is the responsibility of the administration and staff to adhere to a procedural format which provides districtwide consistency. The following procedures have been clearly defined by the Board of Education.

1. All indicators of suspected abuse must be reported immediately to the Central Registry of Child Abuse and Maltreatment in Onondaga County. This Registry is maintained by the New York State Department of Social Services and, as the "Hot Line," receives reports twenty-four hours a day, seven days a week; 422-9701.

2. Reportable Conditions Under New York State Law

Section 412 of Title 6 of the Social Services Law states that an abused child is a child under 18 years of age who is defined by the Family Court Act, Section 1012, as follows:

"Abused child" means a child less than 18 years of age whose parent or other person legally responsible for his/her care

a. inflicts, or allows to be inflicted upon such child, physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

b. creates, or allows to be created, a substantial risk of physical injury to such a child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

c. commits, or allows to be committed, a sex offense against such child as defined in the penal law, provided, however, that the corroboration requirements contained therein shall not apply to proceedings under this article.

Section 412 of Title 6 of the Social Services Law defines a maltreated child as a child under 18 years of age defined by the Family Court Act as one who has had serious physical injury inflicted upon him/her by other than accidental means.

Section 1012 of the Family Court Act defines a neglected child as follows:

"Neglected child" means a child less than 18 years of age

a. whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his/her parent or other person legally responsible for his/her care to exercise a minimum degree of care:

(1) in supplying the child with adequate food, clothing, shelter or education in accordance with provisions of part one of article sixty-five of the Education Law, or medical, dental, optometrical or surgical care though financially able to do so or offered financial or other reasonable means to do so; or

(2) in providing the child with proper supervision or guardianship, by unreasonably inflicting, or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by using a drug or drugs; or by using alcoholic beverages to the extent that he/she loses control of his/her actions; or by any other acts of a similarly serious nature requiring the aid of the court; or

(3) who has been abandoned by his/her parents or other person legally responsible for his/her care.

3. Persons Required to Report Cases of Suspected Child Abuse or Maltreatment

All of the following persons are required under Social Services Law, Section 413, to report situations of suspected child abuse and maltreatment:

Physicians
Surgeons
Medical Examiners
Coroners
Dentists
Osteopaths
Optometrists
Chiropractors
Podiatrists
Residents
Interns
Registered Nurses
Hospital Personnel engaged in admission examination, care or treatment
Christian Science Practitioners
Social Service Workers
School Officials
Day Care Center Worker, any other child care or foster care worker
Peace Officers or Law Enforcement Officials
Mental Health Professionals

This Section of the law provides that any professional staff member of the school must report any situation in which they suspect that a child may be abused or maltreated. The law does not require certainty or proof prior to reporting. It is also important to note that although this Section provides for a report to be made to the administrator, it does not give the administrator the power to prohibit reports from being made to the Central Registry of Child Abuse and Maltreatment in Onondaga County, nor does it relieve the original source from insuring that a report is made.

4. Legal Implications for Mandated Reports

Immunity: Mandated reporters (school personnel) who, in good faith, make a report or take photographs of injury and bruises are immune from any liability, either civil or criminal, that might otherwise result from such action. The good faith of any person required to report cases of suspected abuse or maltreatment is presumed.

Liability: Any person required to report who willfully fails to do so is guilty of a Class A misdemeanor.

5. Reporting Procedures

a. Section 413 mandates that whenever an individual is required to report suspected abuse or maltreatment in his/her capacity as a member of the school staff, he/she shall immediately notify the building principal, or his/her designated agent.

b. All reporting is done through the school Health Office, in conjunction with the school nurse, by the primary source of information which includes teachers, social workers, deans, counselors, etc. A flow chart depicting specific directions for persons reporting suspected child abuse is available in the school Health Office.

c. Under *no* circumstances will a parent be contacted for an explanation prior to making a report.

d. The primary source of information will complete (in conjunction with the school nurse) the Report of Suspected Child Abuse and Maltreatment (DSS-221 A). Within 48 hours of the oral report, this form must be filed with the Department of Social Services Child Protective Service Unit. All copies of this report will be secured in the school Health Office.

e. The school nurse will verbally notify the district Health Services Office of the report. Upon notification of verification from the Department of Social Services (within 90 days), the district Health Services Office will be informed of the status of the report.

f. The school nurse will document all bumps, bruises, scrapes, etc. on the cumulative health record. Additionally, the filing of a DSS report must be charted and the disposition of an unfounded or ongoing case must be noted.

6. Child Protective Services: Interviews on School Property

Investigative procedures will be carried out by the appropriate County or State agency personnel.

a. School principals will assist the staff of the Child Protective Services to fulfill their responsibilities. In those cases where a report of suspected abuse or maltreatment has been filed, it is recommended that the school permit the child to be interviewed, on school property, by the Child Protective Services Worker. Such interviews should be conducted in the presence of a school official. However, the school official may be absent during the interview if it is determined that his/her presence would be detrimental to the interview.

b. In those cases where Child Protective Services determines that the child is in imminent danger, the Department of Social Services worker, in conjunction with a law enforcement officer, has the authority to take the child into protective custody without the consent of the child's parent or guardian. A law enforcement agency release form will be signed at this time.

7. Access to School Records

"An educational agency or institution may disclose personally identifiable information from the education records of a student to appropriate parties in connection with emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals." The Federal Family Education Rights and Privacy Act of 1974 Part 99.36(a).

The following factors must be considered in determining whether an emergency exists:

a. the seriousness of the threat to the health and/or safety of the student or other individual;

b. the need for the information to meet the emergency;

c. if time is of the essence in the reporting of the suspected abuse and/or neglect because delay may create the threat of future harm or result in the family leaving the jurisdiction involved.

8. Mandated Training and Reporting of Suspected Cases of Child Abuse and Maltreatment - Chapter 544

Chapter 544, effective January, 1989, amends Social Services Law and Sections 3003, 3004, 3007, 5003 and 6507(3)(a) of the Education Law. Pursuant to this law, the Commissioner of Education requires that any person applying for any of the certificates, licenses, registrations and/or limited permits listed below, on or after January 1, 1991, shall be required to have two hours of coursework or training in the identification and reporting of child abuse and maltreatment. The coursework or training must be obtained from an institution or provider approved by the Department of Education to provide such coursework or training.

Certificates and licenses affected by Chapter 544:

a. Superintendent's Certificate
b. Teaching Certificate or License
c. Endorsement of a Certificate or Diploma from other than New York State
d. License to be a teacher or director of a private school
e. Initial or Renewed License - physician, chiropractor, dentist, registered nurse, podiatrist, optometrist, psychiatrist or psychologist.

Appendix A-5

SAMPLE POLICY

REPORTING CHILD ABUSE

The Board of Education, recognizing the need to protect children who may be abused or neglected, affirms its support of effective implementation of the North Carolina Child Abuse Reporting Law and acknowledges its responsibility to interpret to public school personnel their legal duty for reporting such cases, and for informing public school personnel of the procedures to follow in making such reports.

The Board further acknowledges that every person is mandated by Chapter 7A, Article 44 of the General Statutes of North Carolina, to report any suspected cases of child abuse or neglect to the Randolph County Department of Social Services for investigation and possible action.

If a person other than the parent/guardian/caretaker of the child is suspected of child abuse, the report of such suspected abuse shall be made directly to the district attorney or appropriate law enforcement department.

The primary purpose of requiring reports of child abuse and neglect is to identify children suspected to be abused or neglected and to assure that protective services will be made available to such children and their families as quickly as possible. This will help ensure that such children will be protected, that further abuse or neglect will be prevented, and that the capacity of good child care will be preserved.

Abused Juvenile

An abused juvenile is any juvenile less than eighteen (18) years of age whose parent or other person responsible for his/her care:

> inflicts or allows to be inflicted upon the juvenile a physical injury by other than accidental means which causes or creates a substantial risk of death, disfigurement, impairment of physical health, or loss or impairment of function of any bodily organ; or
>
> creates or allows to be created a substantial risk of physical injury to the juvenile by other than accidental means which would be likely to cause death, disfigurement, impairment or physical health, or loss or impairment of the function of any bodily organ; or commits, permits, or encourages the commission of vaginal intercourse, any sexual act, the obscene or pornographic photographing, filming, or depicting of a child in those acts for commercial or noncommercial usage, or any other offense against public morality and decency provided for in Article 26, Chapter 14 by, with, or upon a juvenile in violation of law; commits, permits, or encourages any act of prostitution with or by the juvenile; or creates or allows to be created serious emotional damage to the juvenile or refuses to permit, provide for, or participate in treatment. Severe emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal or aggressive behavior toward himself or others; or
>
> encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

Neglected Juvenile

A neglected juvenile is one less than eighteen (18) years of age:

who does not receive proper care, supervision, discipline from his/her parent, guardian, custodian, or caretaker; or

who has been abandoned; or

who is not provided necessary medical or other remedial care recommended under State law; or

who lives in an environment injurious to his/her welfare; or

who has been placed for care or adoption in violation of the law.

Duty to Report

Any person or school who has cause to suspect that any juvenile is abused or neglected shall report the case of that juvenile to the Randolph County Director of Social Services. The report may be made orally, by telephone, or in writing. The report shall include information as is known to the person making it, including the name and address of the juvenile; the name and address of the juvenile's parents, guardian, or caretaker; the age of the juvenile; the present whereabouts of the juvenile if not at the home address; the nature and extent of any injury or condition resulting from abuse or neglect and any other information which the person making the report believes might be helpful in establishing the need for protective services or court intervention. If the report is made orally or by telephone, the person making the report shall give his/her name, address, and telephone number. Refusal of the person making the report to give his/her name shall not preclude the Department's investigation of the alleged abuse or neglect.

With certain exceptions, any person reporting a case of child abuse or neglect is entitled to be informed of the results of the investigation by the Director of the Department of Social Services.

This report shall be in written form and must state either: (1) That there is no finding of abuse or neglect; or (2) That the county Department of Social Services is taking action to protect the welfare of the juvenile and what specific action is being taken.

This written notification shall include notice that if the person making the report is not satisfied with the director's decision, he/she may request review of the decision by the prosecutor within five working days of receipt.

Notification by the Director is not required in those cases where a petition is filed with the court within the five day period. Also, notification is not required when the reporter does not identify himself/herself, or when the report waives his/her right to notification.

Procedures for Reporting

Any employee of the Randolph County Schools suspecting child abuse or neglect should report to the Randolph County Department of Social Services, Child Protective Services Intake, 2222 South Fayetteville Street, Asheboro, NC 27203, telephone 629-2131. At night or on weekends the Protective Service worker on call can be reached through the Sheriff's Department at 629-9128.

The school counselor, the attendance counselor, or the home-school coordinator are available to provide assistance in any suspected cases of child abuse or neglect. The attendance counselor and the home-school coordinator may be contacted at the Randolph County Central Office, Asheboro, NC 27203, telephone 629-2131.

Should the school employee providing information about suspected child abuse and neglect give personal identification, the employee may be called upon to furnish information to the investigative worker from the Department of Social Services and to testify during court proceedings. Any school person called to testify will not suffer loss of pay due to absence from work.

Immunity of Persons Reporting

The statute states that anyone making a report or testifying in any judicial proceeding resulting from such a report is immune from any civil or criminal liability that might be incurred or imposed, providing that the person was acting in good faith. In any proceeding involving liability, good faith is presumed.

Legal Ref(s):	G.S. 7A-517 (1) (21)	DEFINITIONS
	G.S. 7A-543	DUTY TO REPORT CHILD ABUSE/NEGLECT
	G.S. 7A-544	INVESTIGATION BY DIRECTOR
		NOTIFICATION TO REPORTER
	G.S. 7A-550	IMMUNITY OF PERSON REPORTING
		Davis v. Durham City Schools, 91 N.C. App. 520

SOURCE: Randolph County (NC) Schools

DATE ADOPTED: May 8, 1989

Appendix A-6

SAMPLE POLICY

CHILD ABUSE GUIDELINES

The problem of child abuse and neglect is difficult to deal with at best. It should be made known to all employees and volunteers in the Washington County School System that legislation passed by the Maryland General Assembly in 1988 provides immunity from any liability or criminal penalty from individuals that participate in the statutory requirement to report suspected child physical, sexual abuse or neglect.

Maryland law requires every health practitioner, educator, human services worker or law enforcement officer who has reason to believe that a child has been subjected to physical abuse or sexual abuse to immediately report to the Department of Social Services or appropriate law enforcement agency.

Those employees that are required to report the suspected abuse or neglect cases are:

1. All professional employees of the Board of Education
2. All clerical, para-professional and other classified employees of the Board of Education.
3. All persons volunteering to assist in the schools of the Board of Education.

Each suspected case must be reported as follows:

1. Physical/Sexual Abuse cases require an immediate oral report to the local department of social services or appropriate law enforcement agency. A follow-up written report must be made within 48 hours to the local department of social services and the local State's Attorney's office. (Form DHR/SSA)

2. Neglect cases require an immediate oral report to the local department of social services. A follow-up written report must be made within 48 hours to the local department of social services.

3. WHEN THERE IS DOUBT ABOUT REPORTING A SUSPECTED SITUATION, IT IS TO BE RESOLVED IN FAVOR OF PROTECTING THE STUDENT AND THE REPORT MADE IMMEDIATELY.

4. Child Abuse/Neglect Forms are on file in the main office of each respective school. (Form DHR/SSA)

5. Department of Human Resources regulations require that the identity of the person reporting a case of suspected child abuse and/or neglect shall not be revealed. Only under court order should a protective service worker reveal the reporting source or if the reporter has given written permission to protective services to reveal his/her identity.

Abuse - Sexual Abuse - Neglect Defined

1. Abuse: (1) The physical injury of a child by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child or by any household or family member under circumstances that indicate that the child's health or welfare is significantly harmed or at risk of being significantly harmed or (2) sexual abuse of a child, whether physical injuries are sustained or not.

2. Sexual Abuse: Any act or acts involving sexual molestation or exploitation, including but not limited to incest, rape, or sexual offense in any degree, sodomy, or unnatural or perverted sexual practices, on a child by any family or household member or by any other person who has the perm-

anent or temporary care or custody or responsibility for supervision of a minor child. Sexual molestation includes, but is not limited to contact or conduct with a child for the purpose of sexual gratification, and may range from sexual advances, kissing or fondling to sexual crimes in any degree, rape, sodomy, prostitution, or allowing, permitting, encouraging, or engaging in the obscene or pornographic display, photographing, filming or depiction of a child as prohibited by law.

3. Neglect: Child neglect means the leaving of a child unattended or other failure to give proper care and attention to a child by the child's parents, guardian, or custodian under circumstances that indicate that the child's health or welfare is significantly harmed or placed at risk of significant harm. However, a child may not be considered to be neglected solely because the child is receiving nonmedical religious remedial care and treatment recognized by State law.

Examples of a neglected child may be one who is:

- left unattended or inadequately supervised for long periods of time.
- showing signs of failure to thrive, or psycho-social dwarfism that has not been explained by a medical condition.
- receiving inadequate medical or dental treatment or insufficient food.
- significantly harmed or at risk of harm as a result of being denied an adequate education due to parental action or inaction.
- wearing inadequate or weather-inappropriate clothing.
- significantly harmed due to a lack of minimal health care and/or fire safety.
- ignored or badgered by the caretaker.
- forced to engage in criminal behavior at the direction of the caretaker.

Investigative Procedures within the School:

1. A school employee may briefly question a student to determine if there is reason to believe that the child's injuries resulted from physical or sexual abuse by the student's caretaker and/or household member. (e.g. What happened to you? How did this happen?) In no case should a student be subjected to undue pressure in order to validate the suspicion of abuse or neglect. When there is doubt about reporting, a suspected situation is to be resolved in favor of protecting the student and the report made immediately.

2. VALIDATION OF SUSPECTED ABUSE IS THE RESPONSIBILITY OF THE DEPARTMENT OF SOCIAL SERVICES, ASSISTED BY THE POLICE. SCHOOL PERSONNEL SHALL NOT ATTEMPT TO CONDUCT AN INTERNAL INVESTIGATION OR AN INDEPENDENT REVIEW OF THE FACTS OR CONTACT THE FAMILY.

3. When a student is being questioned/interviewed by a protective services worker and/or police officer on school premises, a third party may be present unless the principal and the protective services worker determine it to be unwise. If the department of social services and principal are in disagreement, the Executive Director of Pupil Services may be phoned to assist with resolution of the concerns.

Removal of the Student from School Premises:

1. In the event that a student is in need of emergency medical treatment as a result of suspected abuse or neglect, the school principal in collaboration with the school nurse or other health professional when available, shall arrange for the child to be taken immediately to the nearest hospital.

When possible, the protective services worker or law enforcement officer should be consulted before taking the student to the hospital. However, when emergency conditions prevent such consultation, the principal shall notify the protective services worker as soon thereafter as possible. Information from school health records needed during the existence of a health or safety emergency may be disclosed without parental consent.

Educators are required to provide copies of a child's medical/health records information, upon request to the local department of social services as needed as part of a child abuse/neglect investigation or to provide appropriate services in the best interest of a child who is the subject of a report of child abuse or neglect.

2. A student may be removed from the school premises by a protective services worker or police officer only if:

a. local social services has guardianship of the student.

b. local social services has a shelter order or a court order to remove the student. A joint decision by the principal and the protective services worker should be made regarding who will notify the parents of the action to remove the student from school. In the absence of a joint decision the principal shall notify the parent or guardian.

Parental Notification:

Parents should be advised of the legal responsibilities of school staff to report suspected cases of abuse and neglect. Information may be distributed through newsletters, parental handouts or annual notifications of parents' rights and responsibilities.

Confidentiality of Report:

1. All records and reports concerning protective services investigations of child abuse and/or neglect and their outcomes are protected by the confidentiality statute Article 88A, Section 6(b). Unauthorized disclosure of such records is a criminal offense subject to fine and/or imprisonment.

2. The Department of Social Services may notify school reporting services of the receipt of the report.

3. School personnel may request additional information through the pupil services department if department members are part of a multi-disciplinary case consultation team investigating a report or if school personnel are providing services to a child or family that is the subject of the individual report.

SOURCE: Board of Education of Washington County, Maryland

DATE ADOPTED: November 3, 1983. Amended April 17, 1990.

Appendix B

SAMPLE FORM

WAIVER AND RELEASE FOR PERSONNEL INFORMATION

The undersigned applicant/employee hereby expressly authorizes the ________________ Board of Education, its agents and employees to make any investigation of my personal or employment history, expressly including, but not limited to federal and/or state criminal, law enforcement or traffic records. I further authorize any former employer, person, firm, corporation, credit agency, administrative body or governmental agency to give to the Board of Education, its agents or employees any information they may have regarding me. In consideration of the review of my employment application by the ________________ Board of Education, its agents or employees, I hereby release the Board of Education and any and all providers of information to whom this release is sent, from any liability as a result of furnishing or receiving this information.

Note: Check state law provisions which may restrict or prevent your ability to request information or which may limit the use of information received.

Appendix C

San Bernardino County

CHILDREN'S INTERAGENCY PROTOCOL ON CONSENT TO EXCHANGE CONFIDENTIAL INFORMATION

Member agencies enter into this protocol to utilize one standard Release of Information form for authorization to release confidential information and records about children and families served by one or more member agencies. This form is intended to allow the case worker to use one form to access and send records to and from other health mental health, drug and alcohol, education, probation and social services providers. The goal is to have a form which, when properly completed, allows the receiving organization to copy or file it and act upon it without further releases.

Use of a standard release form by all member agencies is intended to better coordinate services between participating agencies who can or are providing services to the same families: minimize duplicate efforts to verify certain facts needed for rendering services; and to help develop the best level of integrated, effective services.

All member agencies agree to develop written guidelines for their staff in using and accepting this form and to train their staff prior to the agreed upon date of implementation. All staff will be informed that the form must be completed in its entirety. The release shall be specific about the nature of information requested. The form shall be time limited with a specific ending date. The release must be signed and dated with a copy given to the signatory. The signatory must be fully informed of the purpose for the release. Staff shall be trained on specific exceptions in exchange of confidential information such as:

- Information given pursuant to mandatory reporting laws.
- Information from an informant, particularly a minor.
- Sensitive health information, such as HIV test results.
- Third party confidential reports, particularly medical reports.

Use of this form is to assist families to participate in the decision to exchange information in order to receive better services. The overall intent however, is to provide families and children their full protection for confidentiality under the law and to ensure families understand and exercise their rights to privacy accordingly.

Nothing in this protocol limits existing practices for exchanging confidential information at the Regional Case Management Councils established under the Children's Services Team as Multi-Disciplinary Teams authorized to exchange information under a standing court order from the presiding juvenile court judge pursuant to WIC Section 827 and 828.

Barbara J. Frank
Chief Probation Officer
Probation Department

Jim McReynolds
Director
Mental Health Department

George R. Pettersen
Director
Department of Public Health

Charles Terrell, Jr.
Superintendent
San Bernardino County Schools

John F. Michaelson
Director
Department of Public Social Services

County of San Bernardino

CHILDREN'S INTERAGENCY
CONSENT TO EXCHANGE CONFIDENTIAL INFORMATION

PLEASE TYPE/PRINT ALL INFORMATION

Child's Name ______________________ Birth Date ______________________

Mother's Maiden Name ______________________ Father's Name ______________________

Social Security No. ______________________ Record No. ______________________

I authorize San Bernardino County Department of ______________________
to exchange information with:

____
Agency/Person/Organization

____
Address

about information obtained during the course of my/my child's treatment/case/ service plan for
____.

The exchange of records authorized herein is required for the following purpose:
____

Restriction: Release or transfer of the specified information to any person or agency not named herein is prohibited unless indicated below:

Such exchange shall be limited to the following specific types of information:
____
____.

This consent is subject to revocation by the undersigned at any time except to the extent that action has been taken in reliance hereon, and if not earlier revoked, it shall terminate, without express revocation on:
____.
Date, Event, or Condition

I understand I am entitled to receive a copy of this consent, _______ copy(ies) requested and received. I have read this consent carefully and have had all my questions answered.

Date ______________________ Witness ______________________

Signed ______________________ Signed ______________________
Case Manager/County Representative Parent, Guardian

Agency ______________________

- CONFIDENTIAL CLIENT INFORMATION -
SEE CALIFORNIA WELFARE AND INSTITUTIONS CODE SECTION 5328 AND SECTION 10850. CIVIL CODE 34, 56 and 1798. 42 C.F.R. SECTION 2.34 AND 2.35. EDUCATION CODE 49075. HEALTH AND SAFETY CODE 1795.

RELEASED RECORDS

The following records and/or information was released to:

____

Summary of Record

Diagnosis/ Assessment

Social History

Treatment Plan

Financial Information

Psychiatric Evaluation

Medical Assessments, Lab Tests, etc.

History of Drug/ Alcohol Abuse

Other Evaluations/ Assessments (specify)

____

____

____

____

Results of Psychological/ Vocational Testing

Other (specify)

____

____

____

____

____

____

____

____

____

____

Released by:

SIGNATURE____

TITLE ________________________________ DATE ___/___/___

AUTHORIZATION FOR RELEASE OF CONFIDENTIAL INFORMATION

Citation Examples:

Health and Safety Code 5
W&I Code 10850 and 5328
Ed. Code 49075
Civil Code 56 and 1796
42 CRF Part 2

Case Name:

Case Record No.:

Date of Birth:

Procedure No. 5625
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1-23-89

Appendix D

SAMPLE FORM

San Diego Unified School District
Administrative Procedures

RELEASE OF STUDENT INFORMATION — PARENT, GUARDIAN, OR STUDENT CONSENT

Dear Parent:

The school does not release the type of information requested below concerning your child to any noneducational organization, agency, or individual without your consent. The organization, agency, or individual noted below has requested the information indicated. Please check the appropriate box indicating whether or not you wish the school to release the information; sign and return this form to the office of the principal as soon as possible.

You may receive a copy of the record or information to be released by submitting a request in writing to the school office. (There is a nominal charge of 10 cents per sheet.) If you have any questions regarding the information, we can assist in interpreting it. This form will be filed in your child's records.

Very truly yours,

____
Principal

________________ ____________________________
Date School

- -

____
(Organization, agency, or individual requesting information)

Name of Student:____

Description of information requested: ______________________________
____
____

Approved for release______

Not approved for release______

____
(Signature of parent or guardian)

____
(Date)

NOTE TO SCHOOLS: Whenever possible, request that agency, individual, or organization requesting information obtain parental consent; the school need not do this for them. Certification of non-release to third parties (Sample Form #3) can be a part of their request form.

SAMPLE FORM

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1-23-89

RELEASE OF STUDENT INFORMATION
AGREEMENT TO LIMIT USE OF INFORMATION RECEIVED
(Nonschool Agencies or Individuals)

Name of student: ______________________________

Description of information requested: ______________________________

____

____

____

____

Purpose for which requested: ______________________________

____

____

____

I certify that the information received will be used only for the purpose noted above, and will not be transmitted to others.

____
(Signature of individual authorized to receive information)

____
(Organization or agency)

____
(Date)

Appendix E

IOWA DEPARTMENT OF EDUCATION
POLICY STATEMENT
AND
PROCEDURES FOR CHARGING AND INVESTIGATING ALLEGATIONS OF ABUSE OF STUDENTS BY SCHOOL EMPLOYEES

STATEMENT OF POLICY

It is the policy of the ____________________ school (district) that school employees not commit acts of physical or sexual abuse, including inappropriate and intentional sexual behavior, toward students. Any school employee who commits such acts is subject to disciplinary sanctions up to and including discharge.

It is the policy of the ________________ school (district) to respond promptly to allegations of abuse of students by school employees by investigating or arranging for full investigation of any allegation, and to do so in a reasonably prudent manner. The processing of a complaint or allegation will be handled confidentially to the maximum extent possible. All employees are required to assist in the investigation when requested to provide information, and to maintain the confidentiality of the reporting and investigating process.

The _________________ school (district) has appointed a level-one investigator(s) and alternate(s), and has arranged for or contracted with a trained, experienced professional to serve as the level-two investigator. The level-one investigator(s) and alternate(s) will be provided training in the conducting of an investigation, at the expense of the ________________ school (district).

The superintendent or designee shall prescribe rules in accordance with the rules adopted by the State Board of Education to carry out this policy.

Date of Adoption ____________________

Legal References: Iowa Code §280.17
Iowa Admin. Code 281—102

RULES
(Comments omitted)

281—102.1(280) **Statement of intent and purpose**. It is the purpose and intent of these rules to create a uniform procedure for the reporting, investigation, and disposition of allegations of abuse of students directly resulting from the actions of school employees or their agents. The scope of this policy is limited to protecting children in prekindergarten and K-12 educational programs.

281—102.2(280) **Definitions**.

"Abuse" may fall into either of the following categories:

1. "Physical abuse" means nonaccidental physical injury to the student as a result of the actions of a school employee. Injury occurs when evidence of it is still apparent at least 24 hours after the incident. Physical abuse may occur as the result of intentional infliction of injury or excessive, unnecessary, or unreasonable use of force.

2. "Sexual abuse" means any sexual offense as defined by Iowa Code chapter 709, or Iowa Code section 728.12(1). The term also encompasses acts of the school employee that encourage the student to engage in prostitution as defined by Iowa law, as well as inappropriate, intentional sexual behavior by the school employee toward a student.

"Board of Educational Examiners" means the state board of educational examiners as created by 1989 Iowa Acts, House File 794, section 2 [Codified at Iowa Code chapter 260 (Supp. 1990)].

"Designated investigator" means the person or persons appointed by the board of directors of a public school district, or the authorities in control of a private school, at level one, to investigate allegations or reports of abuse of students by school employees, and shall also refer to the appointed alternate.

"Preponderance of evidence" means reliable, credible evidence that is of greater weight than evidence offered in opposition to it.

"Nonpublic school" means any school in which education is provided to a student, other than in a public school or in the home of the student.

"Public school" means any school directly supported in whole or in part by taxation.

"Reasonable force" is that force and no more which a reasonable person, in like circumstances, would judge to be necessary to prevent an injury or loss and can include deadly force if it is reasonable to believe that such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, or it is reasonable to believe that such force is necessary to resist a like force or threat.

"School employee" means a person who works for pay or as a volunteer under the direction and control of:

1. The board of directors or of any administrator of a public school district.

2. The board or authorities in control of a nonpublic school.

3. The board of directors or administrator of an agency called upon by a school official to provide services in an educational capacity to students.

4. An employee of any residential institution, not currently covered by Iowa Code chapter 232, providing educational services.

School employees are of two classes: certificated (licensed) and noncertificated (unlicensed). A certificated employee holds an Iowa teacher's certificate issued by the department of education or a license issued by the state board of educational examiners.

"Student" means a person enrolled in a public or nonpublic school or a prekindergarten program in a public or nonpublic school established under Iowa law, a child enrolled in a day care program operated by a public school or merged area school under Iowa Code section 279.49, or is a resident between the ages of 5 and 21 of a state facility providing incidental formal education.

281—102.3(280) **Jurisdiction**. To constitute a violation of these rules, acts of the school employee must be alleged to have occurred on school grounds, on school time, on a school-sponsored activity, or in a school-related context. To be investigable, the report must include basic information showing that the victim of the alleged abuse is or was a student at the time of the incident, that the alleged act of the school employee resulted in injury or otherwise meets the definition of abuse in these rules, and that the person responsible for the act is currently a school employee.

281—102.4(280) **Exceptions.**

102.4(1) The following do not constitute physical abuse, and no school employee is prohibited from:

a. Using reasonable and necessary force, not designed or intended to cause pain:

(1) To quell a disturbance or prevent an act that threatens physical harm to any person.

(2) To obtain possession of a weapon or other dangerous object within a pupil's control.

(3) For the purposes of self-defense or defense of others as provided for in Iowa Code section 704.3.

(4) For the protection of property as provided for in Iowa Code section 704.4 or 704.5.

(5) To remove a disruptive pupil from class, or any area of school premises or from school-sponsored activities off school premises.

(6) To prevent a student from the self-infliction of harm.

(7) To protect the safety of others.

b. Using incidental, minor, or reasonable physical contact to maintain order and control.

102.4(2) In determining the reasonableness of the force used, the following factors shall be considered:

a. The nature of the misconduct of the student, if any, precipitating the physical contact by the school employee.

b. The size and physical condition of the student.

c. The instrumentality used in making the physical contact.

d. The motivation of the school employee in initiating the physical contact.

e. The extent of injury to the student resulting from the physical contact.

281—102.5(280) **Duties of school authorities.** The board of directors of a public school district and the authorities in control of a nonpublic school shall:

102.5(1) Annually identify at least one designated investigator and alternate investigator at an open public meeting.

102.5(2) Adopt written procedures that establish persons to whom the school authorities will delegate a second level of investigation beyond the level-one procedures specifically described in these rules, including law enforcement authorities or the county attorney's office, personnel of the local office of the department of human services, or private parties experienced and knowledgeable in the area of abuse investigation. The second-level investigator shall not be a school employee, and shall be considered an independent contractor if remunerated for services rendered.

The adopted procedures shall conform to these rules and shall include provisions for the safety of a student when, in the opinion of the investigator, the student would be placed in imminent danger if continued contact is permitted between the school employee and the student. These provisions shall include the options of:

a. Temporary removal of the student from contact with the school employee.

b. Temporary removal of the school employee from service.

c. Any other appropriate action permissible under Iowa law to ensure the student's safety.

The adopted written procedures shall include a statement that the investigators appointed and retained under this chapter shall have access to any educational records of a student who is the named victim of alleged abuse, and access to the student for purposes of interviewing and investigating the allegation.

102.5(3) Annually publish the names and telephone numbers of the designated investigator and alternate:

a. In the student handbook.

b. In a local newspaper of general circulation, and

c. Prominently post the same information in all buildings operated by the school authorities.

102.5(4) Arrange for annual in-service training for the designated investigator and alternate in investigating reports of abuse of students.

281—102.6(280) **Filing of a report.**

102.6(1) Who may file. Any person who has knowledge of an incident of abuse of a student committed by a school employee may file a report with the designated investigator.

102.6(2) Content of report. The report shall be in writing, signed, and witnessed by a person of majority age, and shall contain the following information:

a. The full name, address, and telephone number of the person filing.

b. The full name, age, address, telephone number, and attendance center of the student.

c. The name and place of employment of the school employee(s) or agents who allegedly committed the abuse.

d. A concise statement of the facts surrounding the incident, including date, time, and place of occurrence, if known.

e. A list of possible witnesses by name, if known.

f. Names and locations of any and all persons who examined, counseled or treated the student for the alleged abuse, including the dates on which those services were provided, if known.

102.6(3) Incomplete reports. The designated investigator shall aid parties requesting assistance in completing the report. An incomplete report shall not be rejected unless a reasonable person would conclude that the missing information which is unable to be provided by the reporter, would render investigation futile or impossible. An unsigned (anonymous) or unwitnessed report may be investigated, but the designated investigator then has no duty to report findings and conclusions to the reporter.

281—102.7(280) **Receipt of report**. Any school employee receiving a report of alleged abuse of a student by a school employee shall immediately give the report to the designated investigator or alternate and shall not reveal the existence or content of the report to any other person.

281—102.8(280) **Duties of designated investigator — physical abuse allegations.**

102.8(1) Upon receipt of the report, the designated investigator shall make and provide a copy of the report to the person filing, to the student's parent or guardian, if different from the person filing, and to the supervisor of the employee named in the report. The school employee named in the report shall receive a copy of the report at the time the employee is initially interviewed by any investigator. However, if this action would conflict with the terms of a contractual agreement between the employer and the employee, the terms of the contract shall control.

102.8(2) Within 5 school days of receipt of a report of physical abuse, the designated investigator shall conduct and complete an informal investigation after reviewing the report to determine that the allegations, if true, support the exercise of jurisdiction pursuant to rule 102.3.

102.8(3) If, in the investigator's opinion, the magnitude of the allegations in the report suggest immediate and professional investigation is necessary, the designated investigator may temporarily defer the level-one investigation. In cases of deferred investigation, the investigator shall contact appropriate law enforcement officials, the student's parent or guardian and the person filing the report, if different from the student's parent or guardian, documenting in writing the action taken.

102.8(4) The investigator shall interview the alleged victim, the school employee named in the report, and any collateral sources who may have knowledge of the circumstance contained in the report. The investigator shall exercise prudent discretion in the investigative process to preserve the privacy interests of the individuals involved. To the maximum extent possible, the investigator shall maintain the confidentiality of the report.

102.8(5) The designated investigator's role is not to determine the guilt or innocence of the school employee or the applicability of the exceptions listed in rule 102.4. The designated investigator shall determine, by a preponderance of the evidence, whether it is likely that an incident took place between the student and the school employee. However, if the complaint has been withdrawn, the allegation recanted, or the employee has resigned, admitted the truth of the allegations, or agreed to relinquish the employee's teachers certificate or license, the designated investigator may conclude the investigation at level one. The designated investigator shall follow the applicable provisions of 102.11(2) and (3) when resolution occurs at level one.

The second-level investigator appointed, contracted, requested or retained under subrule 102.5(2), when called upon for further investigation, shall consider the applicability of the exceptions listed in rule 102.4 in reaching conclusions as to the occurrence of abuse as defined by these rules.

102.8(6) Within 15 calendar days of receipt of the report, the designated investigator shall complete a written investigative report, unless investigation was temporarily deferred.

281—102.9(280) **Duties of designated investigator — sexual abuse allegations.**

102.9(1) Upon receipt of the report, the designated investigator shall make and provide a copy of the report to the person filing and to the student's parent or guardian, if different from the person filing. The school employee named in the report shall receive a copy of the report at the time the employee is initially interviewed by any investigator. However, if this action would conflict with the terms of a contractual agreement between the employer and employee, the terms of the contract shall control. The designated investigator shall not interview the school employee named in a report of sexual abuse until after a determination is made that jurisdiction exists, the alleged victim has been interviewed, and a determination made that the investigation will not be deferred under subrule 102.9(5).

102.9(2) Upon receipt of a report of sexual abuse or other notice of an allegation of sexual abuse, the designated investigator shall review the facts alleged to determine that the allegations, if true, support the exercise of jurisdiction pursuant to 102.3 of these rules.

102.9(3) The investigator shall interview the alleged victim as soon as possible, but in no case later than five days from the receipt of a report or notice of the allegation of sexual abuse. The investigator may contact the student's parent or guardian prior to interviewing the student, but shall conduct the interview with the student in the absence of the student's parent or guardian. The investigator may record the interview electronically.

The investigator shall exercise prudent discretion in the investigative process to preserve the privacy interests of the individuals involved. To the maximum extent possible, the investigator shall maintain the confidentiality of the report.

102.9(4) The designated investigator's role is not to determine the guilt or innocence of the school employee. The designated investigator shall determine, by a preponderance of the evidence and based upon the investigator's training and experience and the credibility of the student, whether it is likely that an incident took place between the student and the school employee. However, if the complaint has been withdrawn, the allegation recanted, or the employee has resigned, admitted the truth of the allegation, or agreed to relinquish the employee's teachers certificate or license, the designated investigator may conclude the investigation at level one. The designated investigator shall follow the applicable provisions of 102.11(2) and (3) when resolution occurs at level one.

102.9(5) If, in the investigator's opinion, it is likely that an incident in the nature of sexual abuse as defined by Iowa Code chapter 709 or section 728.12(1) took place, the investigator shall temporarily defer further level-one investigation. In cases of deferred investigation, the investigator shall immediately contact appropriate law enforcement officials, notifying the student's parent or guardian, and the person filing the report, if different from the student's parent or guardian, of the action taken.

If, in the investigator's opinion, an incident occurred that would not constitute sexual abuse as defined in Iowa Code chapter 709 or sexual exploitation as defined by Iowa Code section 728.12(1), but that was in the nature of inappropriate, intentional sexual behavior by the school employee, further investigation is warranted. The investigator may proceed to interview the school employee named in the report and any collateral sources who may have knowledge of the circumstance contained in the report, or may arrange for the level-two investigator to carry out a professional investigation.

If, in the investigator's opinion, the allegation of sexual abuse is unfounded and further investigation is not warranted, the investigator shall notify the student's parent or guardian, the person filing the report, if different from the student's parent or guardian, and the school employee named in the report of this conclusion in a written investigative report.

102.9(6) Within 15 calendar days of receipt of the report or notice of alleged sexual abuse, the designated investigator shall complete a written investigation report unless the investigation was temporarily deferred.

281—102.10(280) **Content of investigative report.** The written investigative report shall include:

1. The name, age, address, and attendance center of the student named in the report.

2. The name and address of the student's parent or guardian and the name and address of the person filing the report, if different from the student's parent or guardian.

3. The name and work address of the school employee named in the report as allegedly responsible for the abuse of the student.

4. An identification of the nature, extent, and cause, if known, of any injuries or abuse to the student named in the report.

5. A general review of the investigation.

6. Any actions taken for the protection and safety of the student.

7. A statement that, in the investigator's opinion, the allegations in the report are either:

   a. Groundless, or

   b. Founded. (It is likely that an incident took place.)

8. The disposition or current status of the investigation.

9. A listing of the options available to the parents or guardian of the student to pursue the allegations. These options include, but are not limited to:

   a. Contacting law enforcement.

   b. Contacting private counsel for the purpose of filing a civil suit or complaint.

   c. Filing a complaint with the board of educational examiners if the school employee is certificated.

The investigator shall retain the original and provide a copy of the investigative report to the school employee named in the report, the school employee's supervisor and the named student's parent or guardian. The person filing the report, if not the student's parent or guardian, shall be notified that the level-one investigation has been concluded, and of the disposition or anticipated disposition of the case.

281—102.11(280) **Founded reports — designated investigator's duties.** The investigator shall notify law enforcement authorities in founded cases of serious physical abuse and in any founded case of sexual abuse under chapter 709 or sexual exploitation under section 728.12(1) of the Iowa Code. In founded cases of less serious physical incidents or sexual incidents not in the nature of statutory sexual abuse or exploitation as defined by Iowa law, the investigator shall arrange for the level-two investigator to carry out a professional investigation unless the level-one investigation has resulted in a final disposition of the investigation. In addition, the designated investigator shall give a copy of the investigative report to the employee's supervisor and document all action taken.

Upon receipt of the level-two investigator's report under rule 102.12, or upon resolution of the investigation at level one the designated investigator shall:

1. Forward copies of the level-two investigator's report to the student's parent or guardian, the school employee named in the complaint, and the school employee's supervisor; notify the person filing the report, if different from the student's parent or guardian, of the disposition of the case or current status of the investigation.

2. File a complaint with the board in cases where the level-two investigator or law enforcement officials have concluded abuse occurred as defined in these rules, or where the employee has admitted the truth of the allegation or agreed to surrender the employee's certificate or license. The designated investigator has discretion to file a complaint with the board in situations where the employee has resigned as a result of the allegation or investigation but has not admitted the truth of the allegations; and

3. Arrange for counseling services for the student on request of the student, or the student's parent or guardian.

281—102.12(280) **Level-two investigator's duties.** Upon referral by the designated investigator, the level-two investigator appointed, contracted, requested or retained under subrule 102.5(2) shall review the report of abuse; review the designated investigator's report, if any; promptly conduct further investigation as deemed necessary; and create a written report. The level-two investigator's report shall state:

a. Conclusions as to the occurrence of the alleged incident; and

b. Conclusions as to the applicability of the exceptions to physical abuse listed in 102.4; or

c. Conclusions as to the nature of the sexual abuse, if any; and

d. Recommendations regarding the need for further investigation.

The written report shall be delivered to the designated investigator as soon as practicable.

The level-two investigator shall exercise prudent discretion in the investigative process to preserve the privacy interests of the individuals involved. To the maximum extent possible, the level-two investigator shall maintain the confidentiality of the report.

281—102.13(280) **Retention of records.** Any record created by an investigation shall be handled according to formally adopted or bargained policies on the maintenance of personnel or other confidential records. Notes, tapes, memoranda, and related materials compiled in the investigation shall be retained by the public or nonpublic school for a minimum of two years.

Unfounded reports shall not be placed in an employee's personnel file. If a report is founded at level one and unfounded at level two, the founded report from the level-one investigator shall be removed immediately upon receipt of an unfounded report from the level-two investigator.

281—102.14(280) **Effective date.** These rules are effective on July 1, 1989, for school years 1989-90 and thereafter.

Appendix F

STATE CHILD ABUSE REPORTING LAWS*

Ala. Code §§ 26-14-1 to 26-14-13

Alaska Stat. §§ 47.17.020 - 47.17.070

Am. Somoa Code Ann. §§ 45.2001 - 45.2032

Ariz. Rev. Stat. Ann. § 13.3620 (A) - (J)

Ark. Stat. Ann. §§ 12-12-502 to 12-12-516

Cal. Penal Code §§ 11165.1 - 11174.1

Colo. Rev. Stat. §§ 19-3-302 to 19-3-314

Conn. Gen. Stat. §§ 17-38 to 17-38f

Del. Code Ann. tit. 16, §§ 901-909

D.C. Code Ann. §§ 2-1351 to 2-1357

Fla. Stat. Ann. §§ 415-501 to 415-513; 232.50

Ga. Code Ann. § 19-7-5 (a) to (e)

Guam Gov't Code §§ 9120.20 - 9120.34

Hawaii Rev. Stat. §§ 350-1 to 350-7

Idaho Code §§ 16-1601 to 16-1625

Ill. Ann. Stat. ch. 23 §§ 2052-2061

Ind. Code Ann. §§ 31-6-11-1 to 31-6-11-22

Iowa Code Ann. §§ 232.61 - 232.113

Kan. Stat. Ann. §§ 38-1502 to 38-1563

Ky. Rev. Stat. Ann. §§ 620.010 - 620.990

La. Rev. Stat. Ann. § 14:403 (A) - (I)

Me. Rev. Stat. Ann. tit. 22 §§ 4002-4038

Md. Fam. Law Code Ann. §§ 5-701 to 5-715

Mass. Gen. Laws Ann. ch. 119, §§ 1 - 51F

Mich. Comp. Laws Ann. §§ 722.602 - 722.634

Minn. Stat. Ann. §§ 626.556 - 626.562

Miss. Code Ann. §§ 43-21-353 to 43-21-357

Mo. Rev. Stat. §§ 210.110 - 210.172

Mont. Code Ann. §§ 41-3-101 to 41-3-205

Neb. Rev. Stat. §§ 28-710 to 28-725

Nev. Rev. Stat. §§ 432B.020 - 432B.300

N.H. Rev. Stat. Ann. §§ 169-C:2 to 169-C:39

N.J. Stat. Ann. §§ 9:6-8.8 to 9:6-8.36a

N.M. Stat. Ann. §§ 32-1-3 to 32-1-16

N.Y. Soc. Serv. Law §§ 411 - 425

N.C. Gen. Stat. §§ 7A-543 to 7A-548

N.D. Cent. Code §§ 50-25.1-01 to 50-25.1-14

Ohio Rev. Code Ann. § 2151.421 (A) - (I)

Okla. Stat. Ann. tit. 21 §§ 845 - 848

Or. Rev. Stat. §§ 418.740 - 418.775

Pa. Stat. Ann. tit. 11 §§ 2202 - 2218

P.R. Laws Ann. §§ 402 - 433

R.I. Gen. Laws §§ 40-11-1 to 40-11-13

S.C. Code Ann. §§ 20-7-490 to 20-7-540

S.D. Codified Laws Ann. §§ 26-10-10 to 26-10-18

Tenn. Code Ann. §§ 37-1-401 to -412; 37-1-601 to -614

Tex. Fam. Code Ann. §§ 34.01 - 34.22

Utah Code Ann. §§ 62A-4-501 to 62A-4-513

Vt. Stat. Ann. tit. 33 §§ 681 - 685

Va. Code Ann. §§ 63.1-248.1 to 63.1-248.6

V.I. Code Ann. tit. 5 §§ 2532 - 2540

Wash Rev. Code §§ 26.44.010 - 26.44.080

W. Va. Code §§ 49-6A-1 to 49-6A-10

Wis. Stat. Ann. §§ 48.981(1) - 48.981(8)

Wyo. Stat. Ann. §§ 14-3-201 to 14-3-214

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* This list of reporting laws was compiled based on statutes appearing in the U.S. Dep't of Health and Human Services, *State Statutes Related to Child Abuse and Neglect: 1988*

Appendix G

STATUTORY WAIVER OF SCHOOL DISTRICTS' TORT IMMUNITY

State	Immunity waived for simple negligence	Immunity waived for gross negligence
AL	See notes to statutory citations	
AK	X	X
AZ	X	X (1,2,3)
AR	See notes to statutory citations	
CA	X	X
CO	X (4,5)	X (4,5)
CT	X	X (6)
DE	X (7,8)	X (7,8)
DC	—	—
FL	X	X
GA	See note to statutory citations	
HI	X	X
ID	X	X
IL	X	X
IN	X (9)	X (6,9)
IA	X	X
KA	X	X
KY	X (10)	X (10)
LA	X	X
ME	X (4,8)	X (4,8)
MD	X (10,11)	X
MA	X	X
MI	X (4,5)	X
MN	X	X

State	Immunity waived for simple negligence	Immunity waived for gross negligence
MS	X	X
MO	X (4,5)	X (4,5)
MT	X	X
NE	X	X
NV	X	X
NH	X (4,8)	X (4,8)
NJ	X (5,12)	X (5,12)
NM	X (4,8)	X (4,8)
NY	X	X
NC	X (11)	X (11)
ND	X	X
OH	X (4,13,19)	X (4,13,19)
OK	X	X
OR	X (4,13)	X (4,13)
PA	X (4,14,15)	X (4,14,15)
RI	X	X
SC	X (11)	X (11)
SD	See notes to statutory citations	
TN	X (4,5,12)	X (4,5,12,16)
TX	X (4,12,17)	X (4,6,12,17)
UT	X (8,9,12,18)	X (8,9,12,18)
VT	X (11)	X (11)
VA	X (10)	X (10)
WA	X	X
WV	X (4,12)	X (4,12)
WI	X	X
WY	X (4,8,19)	X (4,8,19)

CHART NOTES

1. as to issuance or failure to revoke any permit, license, certificate, approval, etc.

2. as to failure to discover violations of inspection laws applicable to property other than property owned by the public entity.

3. as to an injury to driver of motor vehicle that is attributable to the violation by the driver of § 28-692 or § 28-693 (driving under influence of intoxicating liquor or reckless driving).

4. as to operation of a motor vehicle.

5. as to dangerous and defective condition of public building or public property.

6. in administering medication to students.

7. as to ownership, maintenance or use of any motor vehicle.

8. as to construction, operation and/or maintenance of public buildings or other property.

9. only as to contractual obligations.

10. as to state liability only, not that of local government entities.

11. to the extent of insurance.

12. only as to negligence of employees.

13. for proprietary functions.

14. as to care, custody or control of real premises.

15. as to trees, traffic controls, street lighting, utility services, animals, streets, sidewalks.

16. as to gross negligence of board members.

17. as to bodily injury caused to student by action of employee.

18. as to property actions.

19. as to negligence of an employee within or on grounds of buildings used by political subdivisions.

STATUTORY CITATIONS

Alaska Stat. § 9.50.250 (1985)
Ariz. Rev. Stat. Ann. § 12-820.02 (1992) (Supp. 1993)
Cal. Govt. Code § 945 (1980)
Colo. Rev. Stat. Ann. §§ 24-10-104, 24-10-106 (1990) (Supp. 1993)
Conn. Gen. Stat. Ann. §§ 52-557n, 52-557b(b), 10-212a (1985) (Supp. 1993)
Del. Code Ann. tit. 10, §§ 4012, 4001, 4003 (1987) (Supp. 1992)
Fla. Stat. Ann. §§ 768.28(1), 768.28(5) (1986) (Supp. 1993)
Haw. Rev. Stat. Ann. § 662-2 (1988)
Idaho Code § 6-903(a) (1990)
Ill. Comp. Stat. Ann. § 745 10/1-101.1 (1993) (sovereign immunity of school districts waived by *Molitor v. Kaneland Community School Dist. No. 302,* 18 Ill.2d 11, 163 N.E.2d 89 (1959), *cert. denied,* 362 U.S. 968 (1960))
Ind. Stat. Ann. §§ 34-4-16.5-3.5, 34-4-16.5-5, 34-4-16-1.1 (1986) (Supp. 1993)
Iowa Code Ann. §§ 670.2, 670.4 (1993)
Kan. Stat. Ann. § 75-6101 (1989)
Ky. Rev. Stat. § 44.072 (1986) (Supp. 1992)
La. Const. Art. 12, § 10(A) (1977)
Me. Rev. Stat. Ann. tit. 14, §§ 8104, 8103.3 (1984) (Supp. 1992)
Md. State Govt. Code Ann. § 12-104 (1993)
Mass. Gen. Laws Ch. 258 § 2 (1988) (Supp. 1993)
Mich. Comp. Laws Ann. §§ 691.1405, 691.1406, 691.1407(2)(c) (1987) (Supp. 1993)
Minn. Stat. Ann. § 466.02 (1984) (Supp. 1994)
Miss. Code Ann. § 11-46-5(1) (1972) (Supp. 1993)
Mo. Rev. Stat. § 537.600 (1987) (Supp. 1993)
Mont. Code Ann. § 2-9-102 (1991)
Neb. Rev. Stat. § 13-908 (1991)
Nev. Rev. Stat. § 41.031 (1986) (Supp. 1993)
N.H. Rev. Stat. Ann. § 507-B:2 (1983) (Supp. 1993)
N.J. Stat. Ann. §§ 59:2-2, 59:3-1, 59:4-2 (1992)
N.M. Stat. Ann. §§ 41-4-4 to 41-4-6 (1989) (Supp. 1992)
N.Y. Ct. Clms. Law § 8
N.C. Gen. Stat. § 115C-42 (1991)
N.D. Cent. Code Ann. § 32-12.1-03 (1976) (Supp. 1993)
Ohio Rev. Code Ann. § 2744.02(A) and (B) (1992)
Okla. Stat. Ann. tit. 51, §§ 153-155 (1987) (Supp. 1994)
Or. Rev. Stat. § 30.265 (1991)
Pa. Consol. Stat. Ann. tit. 42, § 8542 (1982) (Supp. 1993)
R.I. Gen. Laws Ann. § 9-31-1 (1985) (Supp. 1993)
S.C. Code Ann. §§ 15-78-20 to 15-78-60 (1976) (Supp. 1993)

Tenn. Code Ann. §§ 29-20-202 to 29-20-205 (1980) (Supp. 1992)
Tex. Educ. Code Ann. §§ 21.905, 21.912 (1987) (Supp. 1994); Tex. Civ. Prac. & Rem. Code §§ 101.021, 101.023(b), 101.051 (1986) (Supp. 1994)
Utah Code Ann. §§ 63-30-5 to 63-30-10 (1993)
Vt. Stat. Ann. tit. 29, § 1403 (1986) (Supp. 1993)
Va. Code Ann. § 8.01-195.3 (1992) (Supp. 1993)
Wash. Rev. Code Ann. § 4.96.010 (1988) (Supp. 1994)
W. Va. Code §§ 29-12A-4(c), 29-12A-7 (1992)
Wis. Stat. Ann. § 893.80 (1983) (Supp. 1993) (Legislative Council Report notes judicial waiver of immunity from which statute draws some of its content.)
Wyo. Stat. Ann. §§ 1-39-105, 1-39-106 (1993)

* * * * * *

NOTES

Alabama Constitution, Art. I, § 14 — State cannot be made a defendant in any court of law or equity. Case law shows school boards of education are not exempt. *Ex parte Board of School Commissioners,* 230 Ala. 304, 161 So. 108 (1935) — county and city boards of education are not strictly government agencies; *Boaz Nursing Home, Inc. v. Recovery Inns of America, Inc.*, 189 Ala. 144, 266 So. 2d 588 (1972) — boards of education are expressly made subject to statute and are not such immediate and strict governmental agencies of the state as to come within protection of this section.

Arkansas Code Ann. § 21-9-301 — No waiver of immunity. But see § 21-9-303, state entities must carry motor insurance to cover situation where employee's negligence causes accident. If no liability coverage exists, then victim can sue state entity.

Georgia Constitution, art. I, sec. II, para. IX —For causes of actions accruing prior to January 1, 1991, defense of sovereign immunity is waived to extent of liability insurance protection. For actions accruing after that date, sovereign immunity is waived as to contracts and as otherwise provided by law. Article IX, sec. II, para. IX gives the General Assembly authority to waive the immunity of school districts by law. School officials are protected by official immunity in the performance of their official functions except where they act with actual malice or intent to cause injury. Official immunity is waived as performance of ministerial functions.

South Dakota Codified Laws § 3-21-7 — No waiver of immunity for state or public entities or their employees. But see § 21-32-16 — waiver of immunity of state to extent of insurance coverage, and § 21-32A1 to 21-32A3 — waiver of immunity of state entities to extent of insurance if insurance has been purchased. Case law show some ambiguity as to whether or not school districts are immune from suit or not.

Appendix H

SELECTED FEDERAL LAWS RELATING TO CHILD ABUSE

U.S. Constitution, 14th Amend., sec. 1: Prohibits taking of life, liberty or property without due process of law. Includes procedural and substantive due process.

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688: Prohibits discrimination on the basis of sex in federally assisted education programs and activities.

Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983: Provides a damages remedy against any "person" who while acting "under color of law" deprives another person of rights secured by the Constitution and federal laws.

Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401 *et seq.*: Requires recipients of federal funds under the statute to provide all children with disabilities a "free appropriate public education" and "related services" in the "least restrictive environment."

Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g: Requires schools that receive federal funds to give parents the right to inspect and review their children's education records and prohibits release of information in those records except with parental consent or court order or under certain other specified circumstances.

Hatch Amendment, 20 U.S.C. § 1232h: Requires schools that receive federal funds to make all instructional materials used in any research or experimentation program available for inspection by parents. Students cannot be required to submit without prior parental consent to psychiatric or psychological examination, testing or treatment in which the primary purpose is to reveal information concerning, among other things, mental or psychological problems embarrassing to the student or his family; sex behavior and attitudes; illegal, anti-social, self-incriminating and demeaning behavior; or critical appraisals of individual's with whom student has close family relationships.

Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 *et seq.*: Creates the National Center on Child Abuse and Neglect and provides grants to states for child abuse and neglect prevention and treatment programs and programs relating to investigation and prosecution of child abuse and neglect cases. Establishes requirements states must meet in order to be eligible for grants.

Victims of Child Abuse Act of 1990, 42 U.S.C. § 13001 *et seq.*: Establishes regional children's advocacy programs and provides grants for local advocacy centers, expansion of court-appointed special advocate programs, child abuse training programs for judicial personnel and practitioners and specialized technical assistance and training programs. Requires certain specified professionals to report suspected child abuse discovered while engaged in a professional capacity on federal land or a federal facility. Requires background checks of new and existing federal employees in certain child care fields.

42 U.S.C. § 1397b note: Requires states receiving funds under Title XX of the Social Security Act to establish procedures for nationwide criminal record checks for all existing and new operators, staff and employees of child care facilities, juvenile detention, correction or treatment facilities. (Statute does not specify schools).

National Child Protection Act of 1993, Pub. L. No. 103-209, 107 Stat. 2490-2495 (Dec. 20, 1993): Requires an authorized criminal justice agency in each state to report child abuse crime information to, or index such information in, the national criminal history background check system. Permits states to establish procedures requiring qualified entities (including schools) designated by the state to contact an authorized state agency to request a nationwide background check to determine whether a person has been convicted of a crime that bears upon her fitness to have responsibility for safety and well being of children.

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